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In the
Supreme Court of the United States.

OCTOBER TERM, 1977.

No. 77-1374

C.K. SMITH & CO., INC.,
AND
BUCKLEY HEATING CO., INC.,
(GASOLINE DIVISION),
PETITIONERS,
v.
NATIONAL LABOR RELATIONS BOARD,
RESPONDENT.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

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BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS.

Table of Contents.

Opinions below	2
Jurisdiction	2
Questions presented	2
Statute involved	4
Statement of the case	6
A. The facts	6
B. The Board's decision and order	13
C. The decision of the Court of Appeals	14
Reasons for granting the writ	15
A. The Court of Appeals has decided a question which had not been, but should be, settled by this court	15
B. The First Circuit Court of Appeals has rendered a decision in conflict with the decisions of other Courts of Appeals	18
C. The First Circuit's decision is in conflict with this Court's decision in NLRB v. Rockaway News Supply Co. and Mastro Plastics Corp. v. NLRB	25
1. NLRB v. Rockaway News Supply Co.	25
2. Mastro Plastics Corp. v. NLRB	29
Conclusion	32
Appendix A — Opinion of the United States Court of Appeals for the First Circuit issued December 28, 1977	1a
Appendix B — Decision and Order of The National Labor Relations Board with Decision of the Administrative Law Judge attached	14a

Table of Authorities Cited.

Cases.

Arlan's Department Store, 133 NLRB No. 56, 48 LRRM 1731 (1961) 30, 32

Buffalo Forge Co. v. Steelworkers, 428 U.S. 397, 92 LRRM 3032 (1976) 16, 17

Hearst Corporation, The, 161 NLRB No. 113, 63 LRRM 1441 (1966), enf'd sub nom. News Union of Baltimore v. NLRB, 393 F. 2d 673, 67 LRRM 2487 (D.C. Cir. 1968) 27, 28, 29

Hoffman Beverage Co., 163 NLRB No. 134, 65 LRRM 1011 (1967) 15n

Keller-Crescent Co., 217 NLRB No. 100, 89 LRRM 1201 (1975), enf. den. 538 F. 2d 1291, 92 LRRM 3591 (7th Cir. 1976) 28

Laconia Shoe Co., Inc., 215 NLRB No. 106 (1974) 15n

Local 814, Teamsters v. NLRB, 546 F. 2d 989, 93 LRRM 2305 (D.C. Cir. 1976) 23

Mastro Plastics Corp. v. NLRB, 350 U.S. 270, 37 LRRM 2587 (1956) 3, 18, 25, 29 30, 31, 32

Montana-Dakota Utilities Co. v. NLRB, 455 F. 2d 1088, 79 LRRM 2854 (8th Cir. 1972) 27

NLRB v. Brown & Root, Inc., 203 F. 2d 139, 31 LRRM 2577 (8th Cir. 1953) 18, 22

NLRB v. General Stencils, Inc., 438 F. 2d 894, 76 LRRM 2288 (2d Cir. 1971) 30

NLRB v. Gibson Prods. Co., 494 F. 2d 762, 86 LRRM 2636 (5th Cir. 1974) 30

NLRB v. Gissel Packing Co., 395 U.S. 575, 71 LRRM 2481 (1969) 30

NLRB v. Gruber's Super Market, Inc., 501 F. 2d 697, 87 LRRM 2037 (7th Cir. 1974) 30

NLRB v. International Van Lines, 448 F. 2d 905, 78 LRRM 2299 (9th Cir. 1971), rev'd in part, 409 U.S. 48, 81 LRRM 2595 (1972) 19, 24

NLRB v. International Van Lines, 409 U.S. 48, 81 LRRM 2595 (1972) 16

NLRB v. L.G. Everist, Inc., 334 F. 2d 312, 56 LRRM 2866 (8th Cir. 1964) 21

NLRB v. Rockaway News Supply Co., 345 U.S. 71, 31 LRRM 2432 (1953) 25, 26, 27, 29

NLRB v. Union Carbide Corp., 440 F. 2d 54, 76 LRRM 2181 (4th Cir. 1971), cert. den. 404 U.S. 826 (1971) 18, 19, 20

News Union of Baltimore v. NLRB, 393 F. 2d 673, 67 LRRM 2487 (D.C. Cir. 1968) 19, 28

Ozark Dam Constructors, 99 NLRB No. 153, 30 LRRM 1192 (1952), enf'd sub nom. NLRB v. Brown & Root, Inc., 203 F. 2d 139, 31 LRRM 2577 (1953) 19, 22, 23

Peerless of America, Inc. v. NLRB, 484 F. 2d 1108, 83 LRRM 3000 (7th Cir. 1973) 30

Pilot Freight Carriers, Inc., 224 NLRB No. 46, 92 LRRM 1338 (1976) 15n

Redwing Carriers, Inc., 137 NLRB No. 162, 50 LRRM 1440 (1962), enf'd sub nom. Teamsters, Local 79 v. NLRB, 325 F. 2d 1011, 54 LRRM 2707 (D.C. Cir. 1963), cert. den. 377 U.S. 905 (1964) 23

Republic Steel Corp. v. Mine Workers, ____ F. 2d ____, 97 LRRM 2836 (3d Cir. 1978) 16

South Prairie Construction Co. v. Engineers, 425 U.S. 800, 92 LRRM 2507 (1976) 31n

Teamsters, Local 79 v. NLRB, 325 F. 2d 1011, 54 LRRM 2707 (D.C. Cir. 1963), cert. den. 377 U.S. 905 (1964) 19, 23

Universal Camera Corp. v. NLRB, 340 U.S. 474, 27 LRRM 2373 (1951) 32

Winter Garden Citrus Products v. NLRB, 238 F. 2d 128, 39 LRRM 2080 (5th Cir. 1956) 30, 31

STATUTES.

28 U.S.C. § 1254(1) 2

National Labor Relations Act, as amended, 29 U.S.C. §§ 151 et seq. passim

§ 1, 29 U.S.C. § 151 4

§ 2(6), 29 U.S.C. § 152(6) 14

§ 2(7), 29 U.S.C. § 152(7) 14

§ 7, 29 U.S.C. § 157 4

§ 8(a)(1), 29 U.S.C. § 158(a)(1) 5, 6, 13, 14, 15

§ 8(a)(3), 29 U.S.C. § 158(a)(3) 5, 6, 13, 14

§ 8(a)(5), 29 U.S.C. § 158(a)(5) 5, 6, 13, 14, 15

§ 10(c), 29 U.S.C. § 160(c) 5

§ 10(e), 29 U.S.C. § 160(e) 6

§ 13, 29 U.S.C. § 163 6

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v.

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

The petitioners, C.K. Smith & Co., Inc. ("Smith"), and Buckley Heating Co., Inc. (Gasoline Division) ("Buckley"), hereby request the issuance of an order granting certiorari to review the judgment and opinion of the United States Court of Appeals for the First Circuit entered in this pro-

ceeding on December 28, 1977. The judgment enforced an order of the National Labor Relations Board (the "Board") that requires, inter alia, your petitioners to reinstate and award back pay to certain employees who were replaced during a strike at the petitioners' common premises.

Opinions Below.

The opinion of the Court of Appeals for the First Circuit, dated December 28, 1977, is reported at 97 LRRM 2460, and is reprinted in Appendix A, *infra*, pp. 1a-13a. The Board's decision and order, with an attached decision of the Administrative Law Judge, are reported at 227 NLRB No. 147, and are reprinted in Appendix B, *infra*, pp. 14a-79a.

Jurisdiction.

The judgment of the Court of Appeals was entered on December 28, 1977, and this petition for writ of certiorari has been filed within ninety days of the entry of that judgment.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented.

The National Labor Relations Board found in this case that two corporations separately engaged in the wholesale

and retail distribution of oil products comprised a single employer within the meaning of the National Labor Relations Act; that two bargaining units of employees of the retail distributor had engaged in a primary strike protesting certain unfair labor practices against them by that corporation; and that the unfair labor practice striker status conferred upon those employees should automatically be conferred upon a separate bargaining unit of the wholesale distributor's employees against whom no unfair labor practices had been committed and with whom the wholesale distributor was lawfully bargaining but who had been permanently replaced by that corporation for legitimate business and economic reasons following their refusal to cross the retail distributor's employees' picket lines at their common place of employment. The actions of the wholesale distributor's employees were also alleged to be in violation of the no-strike clause of their separate bargaining agreement. The Court of Appeals upheld the Board's findings and rendered a judgment enforcing the Board's order of reinstatement with back pay relative to the wholesale distributor's employees. The questions presented by the rulings of the Court of Appeals are:

1. Whether the right to preferential reinstatement conferred by the Board upon a bargaining unit of unfair labor practice primary strikers should automatically be extended to employees comprising a second bargaining unit with whom their common employer was lawfully bargaining and against whom no unfair labor practices had been committed, thereby depriving the employer of the right to permanently replace them for legitimate business and economic reasons following their refusal to cross the primary strikers' picket lines at their common place of employment; and

2. Whether this Court's decision in *Mastro Plastics Corp.* v. *NLRB*, which privileges the breach of a collective

bargaining agreement's broad no-strike clause by a primary strike over an employer's serious and flagrant unfair labor practices, should be extended to privilege a similar breach by the refusal of employees comprising a separate bargaining unit, against whom no unfair labor practices have been committed, to cross the primary picket line of unfair labor practice strikers at their common place of employment.

Statute Involved.

The relevant provisions of the National Labor Relations Act, as amended, 29 U.S.C. §§ 151 et seq. ("the Act"), are as follows:

§ 1, 29 U.S.C. § 151.

. . . . . .

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

§ 7, 29 U.S.C. § 157. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through repre-

sentatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3) [section 158(a)(3)].

§ 8(a), 29 U.S.C. § 158(a). It shall be an unfair labor practice for an employer —

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 [section 157];

. . . . . .

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization:

. . . . . .

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a) [section 159(a)].

§ 10(c), 29 U.S.C. § 160(c). . . . If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or

without back pay, as will effectuate the policies of this Act:

. . . . . .

§ 13, 29 U.S.C. § 163. Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.

Statement of the Case.

On application by the National Labor Relations Board pursuant to § 10(e) of the Act, 29 U.S.C. § 160(e), the First Circuit Court of Appeals enforced an order of the Board by which it summarily affirmed the rulings, findings and conclusions of its Administrative Law Judge ("ALJ") that Smith had by certain acts relative to two separate bargaining units of its employees, herein referred to as "mechanics" and "retail drivers," engaged in conduct violative of §§ 8(a)(1) and (5) of the National Labor Relations Act (the "Act"), 29 U.S.C. §§ 158(a)(1) and (5), causing them to engage in an unfair labor practice strike, and that Buckley had violated §§ 8(a)(1) and (3) of the Act, 29 U.S.C. §§ 158(a)(1) and (3), by refusing to reinstate certain of its employees, herein referred to as "wholesale drivers," who had engaged in a sympathy strike in support of Smith's mechanics and retail drivers (App. A, *infra*, p. 13a; App. B, *infra*, p. 15a).

A. The Facts.

C.K. Smith & Co., Inc., a Massachusetts corporation with offices and its principal place of business located at

99 Crescent Street, Worcester, Massachusetts, is engaged in the sale and retail distribution of oil and related products. During the winter and spring of 1974, Smith employed three retail drivers represented for purposes of collective bargaining by Local 170, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America ("Local 170"), and, from January 14, 1974, to April 18, 1974, had been negotiating with that local for a successor collective bargaining agreement covering said drivers (App. B, *infra*, pp. 30a, 35a). The business agent for Local 170, Carl Gentile, testified he had proposed inclusion in the successor retail drivers' agreement of a so-called "Protection of Rights" (POR) clause which would expressly protect the retail drivers from discharge or discipline if they refused to cross a picket line "including the primary picket line of unions party to this Agreement, and including primary picket lines *at the Employer's place of business*" (emphasis added) (G.C. Ex. 2; R. 44; R. 112-113). He had suggested the inclusion of such a clause since as the business agent representing employees of another company, Pilot Freight, he had experienced considerable difficulty over this issue (R. 106-110). The prior Smith retail drivers agreement had no such clause (R. 107), and neither did the agreement Buckley had covering its wholesale drivers (R. 106). Smith's vice president, David Adams, testified Smith had never agreed to Gentile's proposal (R. 9-11, 920). The ALJ found that, due to disagreement over the inclusion of the POR clause and other items, no collective bargaining agreement had been reached between the parties, and that Smith did not violate the Act by subsequently refusing to sign an agreement the union tendered which included them (App. B, *infra*, pp. 53a, 58a-59a). On or about April 29, 1974, Gentile met with the retail drivers and they voted to strike

because Smith would not sign the contract to which Gentile claimed it had agreed (R. 135-136).

In early March, 1974, Smith's six mechanics participated in an organization campaign for representation by Local 170 (App. B, *infra*, pp. 30a, 33a). Following Business Agent Gentile's telephone call claiming to represent the mechanics, Smith's Vice President Adams, at the request of one of the mechanics, held a meeting with them and "asked the employees in effect to tell him who had signed union cards" (App. B, *infra*, p. 41a). Adams told the men "adjustments could be made if there were not a union" and "to talk it over among themselves, that if they wanted to join a union, they could have one by 5:00 [p.m.], that he was going to have the 'man' over" (App. B, *infra*, p. 41a).

All of the mechanics signed authorization cards at a meeting on March 16, 1974, and on March 20 Gentile and another union official met with Adams and the president of Smith, Mr. James Smith, and demanded recognition. Mr. Smith refused to recognize the union, saying he wanted an election and would talk to his attorney (App. B, *infra*, p. 51a). The ALJ credited Gentile's testimony that during a telephone conversation a few days after March 20, 1974, Adams had agreed to recognize the union (App. B, *infra*, p. 52a). The ALJ further found that on April 23, 1974, after two prior meetings, during one of which the parties had attempted to negotiate the mechanics contract, Adams told Gentile no agreement could be reached on wages and that Smith was going to get an attorney and cease bargaining. On April 25, 1974, Smith filed a representation petition in Case No. 1-RM-902 seeking an election in the "mechanics" unit. On April 26, before an election could be held, the mechanics voted to strike, and did begin striking, on April 29, 1974 (App. B, *infra*, p. 58a). The ALJ found

Smith had wrongfully withdrawn recognition and refused to bargain since April 23, 1974 (App. B, *infra*, p. 54a).

Buckley Heating Co., Inc., a Massachusetts corporation with its principal offices and place of business located at the same premises as those of Smith, is engaged in the wholesale and distribution of oil and related products (App. B, *infra*, pp. 24a, 30a), and, at the time of the strike by Smith's retail drivers and mechanics, actively employed twelve wholesale drivers represented by Local 170 (App. B, *infra*, p. 67a-68a). Since the Board's certification of their bargaining unit in April, 1972 (R. 528), these employees had been covered by successive collective bargaining agreements between Buckley and Local 170 (G.C. Exs. 4A, R. 73; 4B, R. 86). In 1972, during negotiations for the initial contract, Local 170 Business Agent Roger McCarthy testified he had proposed that Buckley become party to a multi-employer, multi-union, area-wide agreement covering employers in the oil, gas and asphalt industries, the so-called "Joint Council 10" Agreement (R. 516, 554). Mr. McCarthy admitted that the president of Buckley, Mr. Smith, refused to sign that agreement and Mr. Smith testified he did so for two reasons: (1) if union members of Joint Council 10 voted to strike the employers group, they would also strike Buckley; and (2) the Joint Council 10 contract contained a Protection of Rights (POR) clause (R. 516, 740). Adams, vice president of Buckley, also testified he told McCarthy that Buckley would not sign a contract with a POR clause since such a clause would interfere with Buckley's contractual obligations to its customers (R. 846), Buckley needed to protect the continuation of its normal operation, and such a clause would conflict with Smith's retail drivers agreement (since it had no POR clause) (R. 849).

Business Agent McCarthy testified that during these same initial negotiations, culminating in the 1972-1973 agreement

(G.C. Ex. 4B, R. 86), he had explained to Mr. Smith that the Buckley drivers would cross a picket line at a customer's place of business unless there were a threat of bodily harm or damage to company equipment. He further testified that if a picket line were set up at the company's premises by fellow employees under a different contract "the unit which is Buckley Heating, Gas, that if somebody put up a picket line, that the people would go through" (R. 539-540). Moreover, referring to an affidavit given the NLRB concerning his statements to Mr. Smith, McCarthy testified:

> The situation would be different, however, if a picket line was set up by fellow employees of the Company premises, meaning fellow employees meaning people that were belonging to Buckley Heating, Gas Division. This situation was not discussed in relation to picket lines set up by employees not under a contract, only in relation to employees that had a contract. *I would explain to the men that one contract has nothing to do with the other and that they should report to work as long as they were not threatened.* (Emphasis added.) (R. 546; R. Ex. 6, R. 588.)

The 1972-1973 contract referred to by McCarthy did not contain a POR clause (G.C. Ex. 4B, R. 86). In February, 1972, the Buckley drivers had engaged in a strike and picketed the common premises; the Smith retail drivers, also represented by Local 170 and under a contract with no POR clause, crossed the Buckley drivers' picket line (R. 870-871).

When the 1972-1973 Buckley agreement expired, Business Agent McCarthy testified he proposed, once again, that Buckley become a party to the Joint Council 10 agreement

(R. 589-591). That agreement contained the following Protection of Rights clause:

> (a) Picket Lines
>
> It shall not be a violation of this Agreement, and it shall not be cause for discharge or disciplinary action in the event an employee refuses to enter upon any property involved in a primary labor dispute, or refuses to go through or work behind any primary picket line, including the primary picket line of Unions party to this Agreement, and *including primary picket lines at the Employer's places of business.* (Emphasis added.) (R. Ex. 12, R. 642-643.)

Once again Buckley refused and Adams testified that he told McCarthy of his reasoning (R. 850-852). Adams testified that the importance of the omission of the POR clause was vividly illustrated to him when the Buckley wholesale drivers crossed a picket line at the Arduini Company in March, 1973 (R. 852-853, 865). For years Buckley had been trying to obtain the Arduini account from its competitor, Texaco (R. 853, 863). During the March strike at Arduini's premises, Texaco drivers refused to cross the picket lines (R. 870), Arduini asked Buckley to fill the order, its drivers crossed the lines, and Buckley obtained the account (R. 873). The Arduini event and Smith's retail drivers' crossing the Buckley drivers' picket lines at the common premises had dramatically demonstrated to Buckley the significance of resisting inclusion of a POR clause in the 1973-1976 agreement (R. 865, 871; G.C. Ex. 4A, R. 73). The importance of obtaining such a POR clause to the union was demonstrated by a list of companies with whom it had executed agreements containing such a clause. Counsel for Local 170,

Christy A. Pano, stipulated the list contained 98 per cent of the union's contracts (R. 648); the list itself reflected the fact that, of 190 agreements, only 25 did not contain a POR clause (R. Ex. 7, R. 636).

On March 22, 1974, at the time Business Agent Gentile had claimed Local 170 was the bargaining representative of Smith's mechanics, Buckley executed the 1973-1976 agreement covering its wholesale drivers (G.C. Ex. 4A, R. 72-73; R. 900; App. B, *infra*, pp. 30a, 52a). It did not contain a Protection of Rights clause.

On April 29, 1974, when Smith's mechanics went on strike, Buckley's wholesale drivers did not report to work. Business Agent Gentile testified he had not held any meeting with them to explain why the mechanics were picketing and he was unaware whether the drivers themselves knew the reasons for the mechanics' strike (R. 197). He testified he assumed the existence of the picket line was the sole reason the Buckley wholesale drivers refused to work and that, at the time, they had no pending grievances with Buckley (R. 200, 202).

Within two and one-half weeks of the strike, Buckley had hired twelve permanent replacements for its wholesale drivers because, as Adams testified:

> Number one, I had a business to run and I had many, many obligations out of this business. We had contractual agreements with Federal, with State agencies. We had performance bonds that we had up. We had obligations under the Federal Energy Office at that time that were mandatory that we supplied certain customers with their base supply of 1972. That's how the Federal regulations read. And in order to run our business in this manner, we had to hire new drivers. (R. 931.)

The ALJ found that on July 8, 1974, the Buckley drivers made an unconditional offer to return to work and were refused reinstatement (App. B, *infra*, p. 67a). From that time until the time of the hearing before him, seven of the drivers had been reinstated (App. B, *infra*, p. 70a).

Counsel for Local 170, Mr. Pano, testified that, at the urging of Board Agent Donlan, the parties agreed to arbitrate the status of the Buckley wholesale drivers and had agreed upon an arbitrator on August 14, 1974 (R. 1009-1012). The record does not reflect whether the arbitration hearings were held. On October 22, 1974, Business Agent Gentile filed Charge 1-CA-10,184 with the Board alleging the wholesale drivers had been "locked out" (App. B, *infra*, pp. 21a, 59a). On January 2, 1975, almost seven months after Buckley's refusal to reinstate the wholesale drivers, Business Agent Gentile filed an amended charge alleging for the first time that Buckley had violated § 8(a)(3) of the Act, 29 U.S.C. § 158(a)(3), by wrongfully refusing to reinstate the wholesale drivers it had permanently replaced (App. B, *infra*, p. 23a).

B. The Board's Decision and Order.

The Board summarily affirmed the findings and conclusions of its Administrative Law Judge in their entirety. The ALJ found that Smith had violated § 8(a)(1) of the Act (29 U.S.C. § 158[a][1]) by interrogating its mechanics concerning their union membership, by promising them adjustments in their working conditions, and by threatening them with loss of work opportunity to dissuade their support of a union; that Smith further violated § 8(a)(5) of the Act (§ 158[a][5]) by voluntarily recognizing Local 170 as the representative of its mechanics and, shortly thereafter, with-

drawing recognition; and, in addition, that Smith violated §§ 8(a)(1) and (5) of the Act (§ 158[a][1] and [5]) by bargaining directly with certain of its retail drivers. He found that Smith's mechanics went on strike on April 29, 1974, as a result of Smith's withdrawal of recognition from Local 170; that Smith and Buckley constituted a single employer within the meaning of §§ 2(6) and (7) of the Act (§§ 152[6] and [7]); and that Buckley's wholesale drivers who had engaged in a sympathy strike by refusing to cross the mechanics' primary picket line at Smith's and Buckley's common premises automatically took on the status of unfair labor practice strikers. Therefore, the ALJ further concluded, Buckley violated §§ 8(a)(1) and (3) of the Act (§§ 158[a][1] and [3]) by refusing to reinstate its wholesale drivers upon their unconditional offer to return on July 8, 1974, rejecting Buckley's contentions that it had a lawful right permanently to replace said drivers for legitimate business and economic reasons (which it had done shortly after the strike began) and, in addition, that said drivers were unprotected as a result of their breach of a no-strike clause, the bargaining history behind which, Buckley contended, unequivocably demonstrated their waiver of the right to engage in any sympathy strike. The ALJ found that Smith's mechanics and retail drivers comprised separate bargaining units distinct from the unit of Buckley's wholesale drivers and made no finding of any unfair labor practice committed by Buckley other than its refusal to reinstate said wholesale drivers.

C. The Decision of the Court of Appeals.

Mindful of the First Circuit's reluctance to upset the credibility findings of the trier of fact, Smith and Buckley

chose not to challenge the Board's findings that Smith had violated §§ 8(a)(1) and (5) of the Act (§§ 158[a][1] and [5]) but, rather, challenged its determinations (1) that Smith and Buckley constituted a single employer; (2) that Buckley's wholesale drivers automatically took on the mantle of Smith's unfair labor practice strikers; and (3) that said wholesale drivers did not, by their sympathy strike, violate the no-strike clause of their agreement. The Court of Appeals rejected each of these contentions and enforced the Board's order (App. A, *infra*, p. 13a). With respect to the second contention, however, the court noted:

> [W]e have found no similar court decisions dealing with the reinstatement rights of unfair labor practice sympathy strikers . . .. (App. B, *infra*, p. 7a.)

Reasons for Granting the Writ.

A. The Court of Appeals has Decided a Question Which has Not been, but Should be, Settled by this Court.

This case presents for decision the important and unresolved issue in industrial relations and in the interpretation of the Act[1] left undecided by this Court's recent decision in

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[1] Recent decisions of the Board have adopted a so-called "stand in the shoes" doctrine whereby the protected or unprotected status conferred upon primary strikers is assumed by sympathy strikers who become subject to discipline or replacement as a result of their refusal to cross a primary picket line. See *Hoffman Beverage Co.*, 163 NLRB No. 134, 65 LRRM 1011 (1967); *Pilot Freight Carriers, Inc.*, 224 NLRB No. 46, 92 LRRM 1338 (1976); *Laconia Shoe Co., Inc.*, 215 NLRB No. 106 (1974).

NLRB v. *International Van Lines*, 409 U.S. 48, 81 LRRM 2595 (1972), namely, whether sympathy strikers against whom no unfair labor practices have been committed should automatically assume the mantle of unfair labor practice primary strikers entitling them to preferential reinstatement rights:

> We need not decide, however, whether the Board was correct in determining that the discharged employees [sympathy strikers] assumed the status of unfair labor practice strikers . . . to reach the conclusion that the Court of Appeals erred in refusing to enforce the Board's order of reinstatement with back pay. 409 U.S. at 52-53, 81 LRRM at 2596.

The resolution of the status of the sympathy strikers in this case and the scope of the employer's right permanently to replace them takes on added and nationwide significance in light of this Court's recent decision in *Buffalo Forge Co.* v. *Steelworkers*, 428 U.S. 397, 92 LRRM 3032 (1976), denying an employer injunctive relief specifically to enforce a sympathy striker's "no strike" pledge. Referring to *Buffalo Forge*, the Third Circuit has recently and aptly noted:

> In so finding, what the Buffalo Forge Court did not decide became as important as what it did . . . it *did not* decide what remedies are available to an employer when the issues precipitating the underlying strike are subject to settlement procedures. (Emphasis added.) *Republic Steel Corp.* v. *Mine Workers*, ____ F. 2d ____, ____, 97 LRRM 2836, 2842 (1978).

The First Circuit recognized in its opinion that Buckley did not have access to the contract's grievance and arbitration machinery (App. A, *infra*, p. 12a), and Buckley made an election of available remedies: rather than seek injunctive relief (*Buffalo Forge*, *supra*, was then undecided) or discipline its sympathy strikers, Buckley elected to replace them permanently for legitimate and economic business reasons (R. 931), reasons which were unchallenged and, in light of the ALJ's automatic conferral of unfair labor practice status, were unconsidered by the ALJ or the Board in its summary affirmance of his order:

> The Respondents presented evidence to the effect that the replacements were required as a matter of economic necessity. I note that as a general principle, unfair labor practice strikers do not lose their right to reinstatement because the Respondents have hired replacements. (App. B, *infra*, p. 68a.)

The sympathy strikers comprised a separate bargaining unit against whom no unfair labor practices had been committed and with whom Buckley was lawfully bargaining. Indeed, at the very height of the alleged unfair labor practices committed by Smith against its separate bargaining units of mechanics and retail drivers, Buckley had executed a new collective bargaining agreement covering its wholesale drivers (G.C. Ex. 4A, R. 72-73) and, at the time of the strike, they had no grievance pending with their employer (R. 900). In keeping with Business Agent McCarthy's testimony that "one contract has nothing to do with the other" (R. 546), Business Agent Gentile testified he had not even met with the wholesale drivers to inform them of the reasons Smith's mechanics were striking (R. 197, 200, 202).

While the Court of Appeals admitted it could find no other judicial precedent approving the Board's "stand in the shoes" doctrine in an unfair labor practice context, it stated it had "no reason to suppose that the Board has not struck a 'proper balance between the asserted business justification and the invasion of employee rights'" (App. A, *infra*, p. 7a). As the record demonstrates, neither the ALJ nor the Board ever considered petitioner Buckley's business justifications.

Your petitioners submit that the First Circuit's approval of the Board's blind application of its "stand in the shoes" doctrine totally eliminates the employer's remedy to replace permanently for legitimate business reasons sympathy strikers against whom no unfair labor practices have been committed, and upsets the delicate balance between the dual Congressional policies of the National Labor Relations Act which this Court struck in its decision in *Mastro Plastics Corp.* v. *NLRB*, 350 U.S. 270, 37 LRRM 2587 (1956), namely, preserving a competitive business economy and, at the same time, preserving the right of labor to better its conditions through collective bargaining. This Court should issue a writ of certiorari to resolve this important question of federal labor law and to restore that balance.

B. The First Circuit Court of Appeals has Rendered a Decision in Conflict with the Decisions of Other Courts of Appeals.

The First Circuit's decision is in direct conflict with that of the Fourth Circuit in *NLRB* v. *Union Carbide Corp.*, 440 F. 2d 54, 76 LRRM 2181 (1971), cert. den. 404 U.S. 826 (1971); the decision of the Eighth Circuit in *NLRB* v. *Brown & Root, Inc.*, 203 F. 2d 139, 31 LRRM 2577 (1953), enforcing *Ozark Dam Constructors*, 99 NLRB No. 153, 30 LRRM 1192 (1952), a Board order completely contrary to its determination in this case; the decision of the District of Columbia Circuit in *Teamsters, Local 79* v. *NLRB*, 325 F. 2d 1011, 54 LRRM 2707 (1963), cert. den. 377 U.S. 905 (1964), and, as argued in Part C, *infra*, that Circuit's decision in *News Union of Baltimore* v. *NLRB*, 393 F. 2d 673, 67 LRRM 2487 (1968); and it would appear to conflict with the Ninth Circuit's decision in *NLRB* v. *International Van Lines*, 448 F. 2d 905, 78 LRRM 2299 (1971), rev'd in part on other grounds, 409 U.S. 48, 81 LRRM 2595 (1972).

In *Union Carbide Corp., supra*, the Fourth Circuit held that subjective analysis of the reasons (the causality) for non-striking sympathy strikers' refusal to cross the primary picket line of striking employees of a common employer was necessary to the Board's determination of their protected or unprotected status. The court enforced a Board order requiring reinstatement of two sympathy strikers who refused to cross an economic primary picket line out of principle, but refused to enforce the order as to an employee who declined to cross the primary picket line out of fear:

> [W]e do not think the record affords any factual basis for the finding that Mullins' refusal was based on principle. A careful reading of the testimony reveals that his refusal was based on fear and nothing else.
>
> One who refuses to cross a picket line by reason of physical fear does not act on principle. He makes no common cause, and contributes nothing to mutual aid or protection in the collective bargaining process. . . . Mullins' refusal to cross the picket line was not protected activity under Section 7, and enforcement of

the Board's order as to him will be denied. 440 F.2d at 56, 76 LRRM at 2182-2183.

The First Circuit's decision is instantly in conflict with *Union Carbide*, since it required no analysis, and the Board made none, of the subjective reasons for the Buckley wholesale drivers' refusal to cross the Smith mechanics' line. Local 170 Business Agent Gentile admitted that the wholesale drivers had no grievances pending with Buckley at the time of their sympathy strike and that he had held no meeting with them to explain the reasons for the mechanics' primary strike (R. 197, 200, 202).

The First Circuit acknowledged that the "only evidence" the ALJ had found "relating to the motivation for the striking activities of the Buckley wholesale drivers on April 29, 1974, through July 8, 1974, consisted of the Union's filing of an unfair labor practice charge contending that such employees were 'locked out'" on October 22, 1974 — four months after the strike ended, "Gentile's testimonial denial . . . that such employees were 'striking'" and "Gentile's testimony to the effect that such employees in effect honored the picket line" (App. A, *infra*, pp. 4a-5a). The court admitted, "To be sure, the business agent of Local 170 testified, perhaps disingenuously, that the wholesale drivers were not 'striking' at all but were simply observing the other bargaining unit's picket line" (App. A, *infra*, p. 5a), and then concluded that this evidence entitled the Board to infer that the wholesale drivers "struck in sympathy" with the mechanics.

Your petitioners have no quarrel with the court's characterization, on these facts, of the strike as a "sympathy strike." They are not, however, probative of the reasons why the Buckley wholesale drivers engaged in such a strike nor,

under the Fourth Circuit's subjective approach, are they probative of these employees' protected or unprotected status. Indeed, the ALJ had refused reinstatement and back pay to two of Buckley's wholesale drivers by reason of their assault on a third wholesale driver who had crossed their picket line (App. B, *infra*, p. 68a; R. 755-757). Moreover, your petitioners had filed unfair labor practice charges of picket line misconduct against Local 170 which the Board unilaterally and informally settled (R. 18), and, in addition, an action in the Massachusetts Superior Court which resulted in a stipulation by Local 170 and Smith's mechanics, individually, to refrain from "attacking, assaulting or threatening" other employees of Smith and Buckley (R. Ex. 15, R. 883). On these facts, the other wholesale drivers may well have refused to cross the picket lines out of fear and not out of principle, but the ALJ and the Board made no inquiry into the subjective reasons for their actions, instead blindly applying the "stand in the shoes" doctrine. The Eighth Circuit has refused to adopt such an "automatic" approach in conferring even economic striker status upon sympathy strikers refusing to cross picket lines at a customer's place of business:

> We see no reason in law, in logic or in the provisions of the Act which compels the acceptance of the Board's attempt to equate these drivers with the status of economic strikers and hold that by their refusal to work they might enter into a legal twilight zone from which they could return to work at any time of their own choosing, so long as it was before permanent replacements had been hired. *NLRB* v. *L.G. Everist, Inc.*, 334 F. 2d 312, 318, 56 LRRM 2866, 2870 (8th Cir. 1964).

While citation to the Eighth Circuit's decision in *Brown & Root, supra,* was made by petitioners' counsel at oral argument, the First Circuit chose not to discuss the decision in its opinion. Contrary to the instant case, in *Brown & Root* (then denominated *Ozark Dam Constructors*) the Board actually examined the causal nexus between unfair labor practices committed by a single employer (Ozark) against one bargaining unit (the Joint Council) and found no reason to extend the unfair labor practice status granted those employees to sympathy strikers in a second unit (IAM) against whom no unfair labor practices had been committed and with whom the single employer had been properly bargaining:

> However, the Trial Examiner held that the IAM employees who struck were themselves unfair labor practice strikers to whom the full reinstatement rights available under the Act should be granted. With this conclusion we cannot agree. . . . [T]he IAM strikers were affirmatively represented in separate certified units with respect to which Ozark was properly bargaining collectively with the IAM. This minority group of IAM employees, unauthorized by their own representative, undertook to strike in conjunction with the Joint Council strikers as to whom Ozark did unlawfully refuse to bargain. It is therefore clear that the strike was not caused by any unfair labor practices directed at the IAM employees, and that they were not immediately affected or aggrieved by Ozark's conduct relating to the Joint Council units. *Nor are we able reasonably to conclude that Ozark's unfair labor practices, rather than a desire to express sympathy and support for the Joint Council strikers, constituted the actual reason for*

> *the work stoppage on the part of the IAM strikers.* (Emphasis added.) 30 LRRM at 1194.

The Board has made no reasoned elaboration for its departure from its own precedent nor for the blind application of its "stand in the shoes" doctrine in this case. "Judicial deference is appropriate . . . only when the agency has made a reasoned decision and articulated its reasoning." *Local 814, Teamsters* v. *NLRB*, 546 F. 2d 989, 992, 93 LRRM 2305, 2307 (D.C. Cir. 1976), Bazelon, C.J., dissenting.

In *Redwing Carriers, Inc.*, 137 NLRB No. 162, 50 LRRM 1440 (1962), the Board upheld the right of an employer to replace sympathy strikers permanently even though they had engaged in protected activity under the Act,

> where it is clear from the record that the employer acted only to preserve efficient operation of his business, and terminated the services of the employees only so it could immediately or within a short period thereafter replace them with others willing to perform the scheduled work. 50 LRRM at 1441.

The District of Columbia enforced that decision *sub nom. Teamsters, Local 79* v. *NLRB*, 325 F. 2d 1011, 54 LRRM 2707 (1963), cert. den. 377 U.S. 905 (1964). The Board in this case made no finding that Buckley acted in reprisal by refusing to reinstate its wholesale drivers and made no inquiry into the adequacy of Buckley's stated business justifications (App. B, *infra*, p. 68a), although the record was clear that Buckley acted solely to preserve the efficient operation of its business (R. 931).

In *NLRB* v. *International Van Lines, supra*, the Ninth Circuit held that the wrongful discharge of sympathy strikers did not convert an economic strike into an unfair labor practice strike so as to give the discharged sympathy strikers unfair labor practice status. Referring to what appears from the decision to be a variant of the Board's "stand in the shoes" doctrine, the court stated:

> Implicit in the Board's reasoning, though not explicitly stated, is the assumption that the conversion of the economic strike into an unfair labor practice strike necessarily converted the four discharged economic [sympathy] strikers into unfair labor practice strikers, to whom the *Mastro Plastics* rule properly applies. That assumption is untenable. 448 F. 2d at 911, 78 LRRM at 2304.

Whether the Fourth Circuit's subjective test, the Board's "stand in the shoes" doctrine approved by the First Circuit, the Eighth Circuit's impact or "immediately affected" criterion or, indeed, a "bright line" test of conferral of economic status on all sympathy strikers regardless of the status given primary strikers should be used to determine their protected or unprotected status and subsequent reinstatement rights is a question of extreme and nationwide importance over which there is a conflict in the Circuit Courts of Appeals and which this Court should ultimately resolve.

C. The First Circuit's Decision is in Conflict with this Court's Decision in NLRB v. Rockaway News Supply Co. and Mastro Plastics Corp. v. NLRB.

1. *NLRB v. Rockaway News Supply Co.*

In *NLRB* v. *Rockaway News Supply Co.*, 345 U.S. 71, 31 LRRM 2432 (1953), this Court relied upon the bargaining history behind a no-strike clause in finding a waiver of the simple right to engage in a sympathy strike, upholding an employer's discharge of an employee who refused to cross a picket line at the premises of another company. That no-strike clause provided:

> No strikes, lockouts or other cessation of work or interference therewith shall be ordered or sanctioned by any party hereto during the terms hereof except as against a party failing to comply with a decision, award, or order of the Adjustment Board. 345 U.S. at 79, 31 LRRM at 2436.

After citing the above contractual provisions, this Court declared:

> If this be considered ambiguous in meaning, respondent offered, as evidence of its intent and meaning, to prove that during the negotiations one of the demands made by the union was a clause in the contract with reference to work stoppages which would have said "No man shall be required to cross a picket line," that this clause was rejected by respondent and the union acquiesced in the rejection and consented to the no-strike clause as above recited. 345 U.S. at 79-80, 31 LRRM at 2436.

As the facts demonstrate, the bargaining history of Buckley's no-strike clause presents a case more compelling than *Rockaway* for a finding of waiver. Buckley was party to a contract containing a no-strike clause which, like *Rockaway*, prohibited all strikes except those in the face of employer noncompliance with an arbitration award:

> There shall be no strike, work stoppage or interruption of work during the term of this Agreement unless the company shall refuse to comply with an arbitration award pursuant to arbitration proceedings instituted in accordance with the terms of this Article. (G.C. Ex. 4A, R. 73.)

If Buckley's no-strike clause is ambiguous relative to sympathy strikes, just as in *Rockaway*, the bargaining history demonstrates that, during negotiations for the initial 1972-1973 agreement and even its 1973-1976 successor, Local 170 Business Agent McCarthy proposed that Buckley become party to the so-called "Joint Council 10" agreement which contained a broad Protection of Rights (POR) clause privileging the observance of *any* primary picket line at the *employer's* premises (R. Ex. 12, R. 642-643). Buckley twice rejected that proposal precisely because of the presence of the POR clause (R. 516, 740, 850-852). Buckley was acutely aware of the clause's significance since Smith's retail drivers, also represented by Local 170 and under a contract with no POR clause, had crossed Buckley drivers' picket lines in February, 1972 (R. 870-871). Moreover, Local 170 Business Agent Gentile admitted that, during negotiations in 1974, he had proposed such a clause for inclusion in the retail drivers' successor contract (R. 112-113), which Smith rejected (R. 9-11, 920). In addition, Buckley drivers had crossed the Arduini employees' picket lines (R. 852-853, 865).

This Court also noted in *Rockaway* the importance of industry practice:

> In addition, the contract between the parties does not specifically permit the refusal by the employee to comply with such an order *although other contracts in the industry do contain such a provision.* (Emphasis added.) 345 U.S. at 80, 31 LRRM at 2436.

The multi-employer, multi-union Joint Council 10 agreement did contain such a provision. Of even greater consequence, Respondent's Exhibit No. 7 demonstrated that, of 190 agreements Local 170 had with other industry employers, only 25 — including petitioners — did *not* contain a Protection of Rights clause (R. Ex. 7, R. 636).

Perhaps the clearest formulation of the meaning of *Rockaway News* comes from the Board's decision in *The Hearst Corporation*, 161 NLRB No. 113, 63 LRRM 1441 (1966), enf'd *sub nom. News Union of Baltimore* v. *NLRB*, 393 F. 2d 673, 67 LRRM 2487 (D.C. Cir. 1968), where the Board held that *Rockaway News* "as a minimum" stands for the proposition that "an ambiguous contract coupled with collateral evidence of [a union's failure to secure a Protection of Rights clause] must be construed as a surrender, during the terms of the agreement, of the simple right to refuse to cross a picket line." *Id.*, 63 LRRM at 1444. See also *Montana-Dakota Utilities Co.* v. *NLRB*, 455 F. 2d 1088, 79 LRRM 2854 (8th Cir. 1972). The POR clause in *Hearst* was, word for word, *exactly the same* as the POR clause in the Joint Council 10 agreement proposed by Local

170 and rejected by Buckley. Yet the precise language of that clause was considered by the Board in *Hearst* to indicate an understanding by the union's negotiators that unless they were successful in having the proposal embodied in their agreement, the agreement would prohibit sympathy striking.

In *Keller-Crescent Co.*, 217 NLRB No. 100, 89 LRRM 1201 (1975), enf. den. 538 F. 2d 1291, 92 LRRM 3591 (7th Cir. 1976), the Board distinguished the facts of that case from *Hearst*, stating that the *Hearst* POR clause:

> strongly indicates that the Teamsters negotiators understood that absent this proposed provision *the agreement*, more specifically the no-strike pledge contained therein, prohibited the refusal to cross another union's picket line or engage in a sympathy strike. Accordingly, in these circumstances, the Teamsters acquiescence in the employer's refusal to accept its picket line language proposal, coupled with acceptance of the broad no-strike pledge language, warranted the inference that the Teamsters understood and intended thereby to waive the statutory right of its members to honor another union's picket line or engage in a sympathy strike. (Emphasis the Board's.) 89 LRRM at 1209.

The District of Columbia Circuit enforced the Board's order in *Hearst*, also noting the Board could properly rely upon statements of union leaders interpreting the scope of the no-strike clause as prohibiting sympathy strikes. *News Union of Baltimore* v. *NLRB*, *supra*, 393 F. 2d at 678, 67 LRRM at 2490.

If Local 170 Business Agent McCarthy's testimony that "I would explain to the men that one contract has nothing to

do with the other and that they should report to work" (R. 546) is ambiguous, as the First Circuit believed it to be (App. A, *infra*, pp. 10a-11a, fn. 2), the language of the Joint Council 10 POR clause rejected by Buckley, the understood significance of the POR clause by all parties, the industry practice reflected by Respondent's Exhibit No. 7, and the history of the Buckley and Smith drivers' actions in crossing picket lines when no POR clauses were in their agreements are not.

Your petitioners submit that the First Circuit misapplied this Court's teaching in *Rockaway News*, *supra*, by concluding that the foregoing bargaining history evidenced a waiver only of the right to honor "picket line[s] at another employer's plant" (App. A, *infra*, p. 11a, fn. 2), that the Board's decision is not in keeping with its own precedent in *The Hearst Corporation*, *supra*, and that this Court should grant the petition for certiorari and find that Local 170's acquiescence in Buckley's rejection of the Joint Council 10 POR clause, which would otherwise have privileged the wholesale drivers from crossing "*any* primary picket line . . . including primary picket lines *at the Employer's places of business*" (R. Ex. 12, R. 642, 643), resulted in their waiver of the right to engage in any sympathy strike.

2. *Mastro Plastics Corp. v. NLRB.*

Petitioners Buckley and Smith readily accept this Court's decision in *Mastro Plastics Corp* v. *NLRB*, 350 U.S. 270, 37 LRRM 2587 (1956), that primary strikers engaged in a strike in violation of a broad no-strike clause in their contract do not lose their protected status under the Act if such a strike was over flagrant and serious unfair labor practices committed against them by their employer and "designed to destroy the very foundation of that contract and that rela-

ationship." *Arlan's Department Store*, 133 NLRB No. 56, 48 LRRM 1731, 1733 (1961). They submit, however, that the teaching of *Mastro Plastics*, as it has been reformulated by the Board in *Arlan's Department Store*, requires that before such a special license to breach the contract is permitted, there must be (1) a finding that the employer's unfair labor practices were serious and flagrant, undermining the very foundation of the contract, and (2) a causal nexus between those unfair labor practices and the strike itself.

The Fifth Circuit has taken such an approach in its decision in *Winter Garden Citrus Products* v. *NLRB*, 238 F. 2d 128, 39 LRRM 2080 (1956), and denied reinstatement of primary strikers where there was no proof of a causal connection between certain alleged unfair labor practices and the strike itself. Indeed, in an only slightly different context, this Court has classified categories of employer unfair labor practices which might warrant a bargaining order, *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 71 LRRM 2481 (1969), and Circuit Courts of Appeals have refused enforcement of Board bargaining orders where it has failed to explain the causal nexus between the employer's unfair labor practices and the impossibility of holding a fair election. *NLRB* v. *General Stencils, Inc.*, 438 F. 2d 894, 76 LRRM 2288 (2d Cir. 1971); *Peerless of America, Inc.* v. *NLRB*, 484 F. 2d 1108, 83 LRRM 3000 (7th Cir. 1973); *NLRB* v. *Gruber's Super Market, Inc.*, 501 F. 2d 697, 87 LRRM 2037 (7th Cir. 1974); *NLRB* v. *Gibson Prods. Co.*, 494 F. 2d 762, 86 LRRM 2636 (5th Cir. 1974).

As has been argued above, neither the ALJ nor the Board made any inquiry into the motivations of the wholesale drivers other than to characterize their actions as a "sympathy strike." They comprised a separate bargaining unit, were under a separate contract, had no contractual grievances pending, and neither Buckley nor Smith committed

any unfair labor practices against them (see Reasons For Granting The Writ, Part A). Even the First Circuit was forced to admit:

> The present case is, to be sure, distinguishable from *Mastro Plastics* in that here the employer's unfair labor practices were destructive of the union's status only in another bargaining unit. (App. A, *infra*, p. 10a.)

Yet, having approved the Board's blind application of its "stand in the shoes" doctrine, the First Circuit was able to accept the Board's premise that Buckley's drivers were "unfair labor practice sympathy strikers" and then conclude that *Mastro Plastics* permitted a finding that they had not breached the no-strike clause of their agreement — as if serious and flagrant unfair labor practices destroying the very foundation of their contract had been committed against them when, in fact, at the very height of Smith's unfair labor practices against its employees, Buckley had executed a new three-year collective bargaining agreement with its wholesale drivers (R. Ex. 4A, R. 72-73; R. 900; App. B, *infra*, pp. 30a, 52a).[1]

The First Circuit has misapplied this Court's decision in *Mastro Plastics, supra*; its decision conflicts with that of the Fifth Circuit in *Winter Garden Citrus Products, supra*; the Board's finding is in conflict with its own precedent in

[1] In this Court's recent decision in *South Prairie Construction Co.* v. *Engineers*, 425 U.S. 800, 92 LRRM 2507 (1976), it upheld the decision of the Court of Appeals of the District of Columbia that South Prairie and Kiewit constituted a single employer but reversed that court's further finding that the separate bargaining units of employees of those employers comprised a single bargaining unit, refusing to blindly equate a finding of "single employer" with a finding of "single bargaining unit."

Arlan's Department Store, supra, and is unsupported by substantial evidence on the record taken as a whole. *Universal Camera Corp.* v. *NLRB,* 340 U.S. 474, 27 LRRM 2373 (1951). This Court should grant the petition for certiorari and reaffirm that *Mastro Plastics, supra,* does not license employees in a bargaining unit against whom no unfair labor practices have been committed to breach the no-strike clause of their agreement.

Conclusions.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Appendix A.

United States Court of Appeals
For the First Circuit

No. 77-1152

NATIONAL LABOR RELATIONS BOARD.
PETITIONER,
v.
C. K. SMITH & CO., INC.,
and
BUCKLEY HEATING CO., INC.,
(GASOLINE DIVISION),
RESPONDENTS.

ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Before
COFFIN, *Chief Judge,*
TUTTLE, *Circuit Judge,*•
CAMPBELL, *Circuit Judge.*

Michael S. Winer, Attorney, with whom *John S. Irving,* General Counsel, *John E. Higgins, Jr.,* Deputy General Counsel, *Carl L. Taylor,* Associate General Counsel, *Elliott Moore,* Deputy Associate General Counsel, and *Judith P. Wilkenfield,* Attorney, were on brief, for petitioner.

Paul J. Kingston, with whom *Robert W. Garrett, Paul V. Mulkern, Jr.,* and *Thompson & Kingston,* were on brief, for respondent.

December 28, 1977

CAMPBELL, *Circuit Judge.* The National Labor Relations Board petitions for enforcement of an order that requires, inter alia, that respondents C. K. Smith & Co. and Buckley Heating Co. cease and desist from committing

•Of the Fifth Circuit, sitting by designation.

certain unfair labor practices and reinstate employees who were replaced during a strike at the companies' common premises.

The Board's order is premised on a finding that the respondents, though separately incorporated, constitute a single "employer" within the meaning of the Act, with each corporation thus responsible for the other's unfair labor practices and with the employees of each commonly protected. We turn first to the companies' challenge to the Board's resolution of this threshold question.

The Administrative Law Judge (hereinafter ALJ), whose findings the Board adopted, found that both corporations are commonly owned and share the same premises in Worcester, Massachusetts, where they have their offices and conduct their business. Both corporations are engaged in the "sale and distribution of . . . oil and related products" with Smith engaged in the retail end of the business and Buckley engaged in wholesale sales. The daily operations and labor relations of both companies are managed by the same people who hold the same offices in both firms. The ALJ also found that "in the handling of labor relations matters for one Respondent, concern is given for the effect of such labor relations on the other Respondent."

The Supreme Court has said that, for purposes of determining "single employer" status,

> "[t]he controlling criteria, set out and elaborated in Board decisions, are interrelation of operations, common management, centralized control of labor relations and common ownership."

Radio Technicians Local 1264 v. *Broadcast Service of Mobile, Inc.*, 380 U.S. 255, 256 (1965). *See, e.g., Western Union Corp.*, 224 N.L.R.B. 274, 276 (1976); *Sakrete of Northern California, Inc.*, 137 N.L.R.B. 1220, 1222 (1962), *enforced*, 332 F.2d 902 (9th Cir. 1964). *See also South*

Prairie Construction Co. v. *Operating Engineers Local 67*, 425 U.S. 800 (1975). The Board's conclusion that two corporations constitute a "single employer" is "essentially a factual one" and not to be disturbed provided substantial evidence in the record supports the Board's findings. *NLRB* v. *R.L. Sweet Lumber Co.*, 515 F.2d 785, 793 (10th Cir.), *cert. denied*, 423 U.S. 986 (1975). *Accord, Newspaper Production Co.* v. *NLRB*, 503 F.2d 821, 827 (5th Cir. 1974).

Respondents do not contest the findings of common ownership, common management and common control of labor relations. Rather they cite various factors which, they say, show that the two firms' operations are not integrated, such as the existence of separate bargaining units and a lack of evidence showing combined accounting records and bank accounts. But there was sufficient other evidence for the Board to find a unified operation. The sharing of common premises is a factor probative of integrated operations. *Marine Welding & Repair Works, Inc.* v. *NLRB*, 439 F.2d 395, 397 (8th Cir. 1971); *NLRB* v. *Jordan Bus Co.*, 380 F.2d 219, 222 (10th Cir. 1967). The sale of essentially similar products via similar distribution methods is also probative of integration. *See Sakrete of Northern California, Inc., supra*, 332 F.2d at 906. And, while the Board's General Counsel had the burden of proving integrated operations, the ALJ could take into account that respondents had primary access to whatever evidence might exist to refute the claim. Not only did they fail to produce evidence capable of rebutting the inferences to be drawn from the evidence introduced by the General Counsel, but, the ALJ noted, their attorney had even retreated without explanation from an earlier agreement to stipulate to facts that might be material to the single employer issue. We find ample basis for the conclusion that "the facts reveal in effect one enterprise

with divisions of the same engaged in 'wholesale' and 'retail' distribution of oil and related products."

On the premise, therefore, that the two firms constituted one employer, we turn to the unfair labor practices alleged. During March and April 1974, Buckley had a collective bargaining relationship with Teamsters Local 170, representing about twelve wholesale drivers. Smith had a bargaining relationship with the same union representing a unit made up of its three retail drivers. And, in March 1974, the six employees in what is termed the "Smith mechanics unit" began organizing in league with Local 170. In findings that are not appealed, the Board found that in the spring of 1974 Smith's president violated § 8(a)(5) & (1) by bargaining individually with retail drivers unit employees during contract negotiations with the union. The Board also found that Smith's officials coercively interrogated and threatened mechanics unit employees during the union organizing campaign. It was also found that the employer had recognized the union as the mechanics' bargaining agent and then had unlawfully withdrawn recognition.

On April 29, 1974, the wholesale drivers, the retail drivers and the mechanics "ceased work concertedly and went out on strike." The strike lasted until July 8. The mechanics led the walkout, having voted to strike after learning of Smith's withdrawal of recognition. The retail drivers, the ALJ found,

> "struck in support of the 'mechanics' who were engaged in an unfair labor practice strike and because of a belief that the Respondents would not negotiate as to the 'retail drivers' contract as long as there was trouble with the mechanics."

The ALJ went on to state,

> "The only evidence, other than the facts previously set forth, relating to the motivation for the striking activities of the Buckley wholesale drivers on April 29, 1974, through July 8, 1974, consists of the Union's filing of an unfair labor practice charge contending that such employees were 'locked out,' Gentile's testimonial denial in effect that such employees were 'striking,' and Gentile's testimony to the effect that such employees in effect honored the picket line."

The ALJ, and the Board, concluded,

> "In sum, the evidence . . . reveals that the 'wholesale drivers' struck in sympathy with the 'mechanics' unit employees in an unfair labor practice strike."

The Local's representative, Gentile, repeatedly testified that the reason the wholesale drivers did not work on April 29 was their refusal to cross the mechanics' picket line. This testimony, together with the common locus and employment, the fact that the same local represented the two dozen men in the three bargaining units, and the concerted timing of the wholesale drivers' action, which began and ended at the same time as the mechanics' strike, entitled the Board to infer that the wholesale drivers "struck in sympathy" with the mechanics. Indeed, no other explanation can easily be imagined. We see no merit in the employer's claim that there was no causal nexus between the unfair labor practices committed against the mechanics and the wholesale drivers' strike. To be sure, the business agent of Local 170 testified, perhaps disingenuously, that the wholesale drivers were not "striking" at all but were simply observing the other bargaining unit's picket line. On these facts, the distinction is without a difference; however the wholesale drivers' walkout is characterized, the inference that it amounted to a sympathy strike, maintained in support of the mechanics' grievances, is reasonable.

Even so assuming, however, the respondents maintain that the Board erred in conferring unfair labor practice

status on the wholesale drivers, and in ordering their reinstatement irrespective of whether the employer had replaced them out of economic necessity. They contend that a sympathy strike is unprotected by § 7.[1] But the sympathy strike here was by employees of a common employer. Such a strike by employees against a common employer and in support of coworkers is "concerted activit[y] for . . . mutual aid or protection". *See Newspaper Production Co., supra,* 503 F.2d at 830; *General Tire & Rubber Co. v. NLRB,* 451 F.2d 257, 258 (1st Cir. 1971); *NLRB* v. *Union Carbide Corp.,* 440 F.2d 54, 55-56 (4th Cir.), *cert. denied,* 404 U.S. 826 (1971); *NLRB* v. *Difco Laboratories, Inc.,* 427 F.2d 170, 171-72 (6th Cir.), *cert. denied,* 400 U.S. 833 (1970); *NLRB* v. *Southern Greyhound Lines,* 426 F.2d 1299, 1301 (5th Cir. 1970). And it has been the Board's policy that where such a sympathy striker supports an unfair labor practice strike against a common employer, the sympathy striker enjoys the same reinstatement rights as the primary striker. *Pilot Freight Carriers, Inc.,* 224 N.L.R.B. 341, 342 (1976); *Hoffman Beverage Co.,* 163 N.L.R.B. 981, 982 (1967).

In determining whether striking employees are entitled to reinstatement, the Board's duty is to balance their interests in the free exercise of their § 7 right against the employer's legitimate business reasons for replacing them.

[1] The employer's reliance on *Montana-Dakota Utilities Co.* v. *NLRB,* 455 F.2d 1088 (8th Cir. 1972) and *NLRB* v. *L.G. Everist, Inc.,* 334 F.2d 312 (8th Cir. 1964), is misplaced. Both cases involved employees' honoring stranger unions' picket lines at another employer's premises. Such conduct is arguably unprotected by § 7 inasmuch as the disciplined employees' self-interest is not directly or indirectly implicated in the primary strike. *See NLRB* v. *Union Carbide Corp.,* 440 F.2d 54, 55 (4th Cir.), *cert. denied,* 404 U.S. 826 (1971). *But see NLRB* v. *Peter Cailler Kohler Swiss Chocolates Co.,* 130 F.2d 503, 506 (2d Cir. 1942) (L. Hand, J.). The type of sympathy strike involved in the present case is clearly protected by § 7.

It is primarily the Board's not the courts' responsibility "to strike the proper balance between the asserted business justifications and the invasion of employee rights in light of the Act and its policy." *NLRB* v. *Fleetwood Trailer Co.,* 389 U.S. 375, 378 (1967), *quoting NLRB* v. *Great Dane Trailers,* 388 U.S. 26, 33-34 (1967); *accord, Hudgens* v. *NLRB,* 424 U.S. 507, 521-23 (1976); *NLRB* v. *Erie Resistor Corp.,* 373 U.S. 221, 229 (1963); *Union Carbide Corp., supra,* 440 F.2d at 57; *NLRB* v. *Alamo Express, Inc.,* 430 F.2d 1032, 1036 (5th Cir. 1970), *cert. denied,* 400 U.S. 1021 (1971).

Circuit courts have upheld the reinstatement of economic sympathy strikers where the striker

> "has in effect plighted his troth with the [other] strikers, joined in their common cause, and has thus become a striker himself. . . . The basis of the protection against discharge afforded an employee who refuses to cross a picket line at his employer's business is his status as a striker. Such an employee is therefore entitled to all the protection due under the National Labor Relations Act to those strikers with whom he has joined cause.".

Southern Greyhound Lines, supra, 426 F.2d at 1301; *accord, Newspaper Production Co., supra,* 503 F.2d at 830. *See, e.g., General Tire & Rubber Co., supra.* While we have found no similar court decisions dealing with the reinstatement rights of unfair labor practice sympathy strikers, we have no reason to suppose that the Board has not struck a "proper balance between the asserted business justification and the invasion of employee rights" in extending the Act's protection to such strikers. *See Pilot Freight Carriers, supra; Hoffman Beverage Co., supra.*

The preferential reinstatement rights accorded unfair labor practice strikers may cause some disruption to an employer which has replaced all or some of them. But the

sympathy striker resisting unfair labor practices may also have more at stake than in the economic strike situation. An employer's attempted ouster of the union in one bargaining unit could have deleterious effects on the union's prestige and the stability of collective bargaining throughout the plant. Such misconduct might be thought to thwart the Act's central policy of "inaugurating regimes of industrial peace," *Linden Lumber Division, Summer & Co.* v. *NLRB,* 419 U.S. 301, 307 (1974), and is of considerably greater moment to affected employees than the issues typically at stake in an economic strike. And, since sympathy strikers stand in the shoes of primary strikers for purposes of lawful discipline and replacement, it seems equitable to afford them preferential reinstatement rights where such rights are granted primary strikers. We conclude, therefore, that the Board has not exceeded its authority in providing the same reinstatement rights to unfair labor practice sympathy strikers in a situation of common employment as are afforded to primary strikers.

The employer's most substantial argument is that reinstatement should not be ordered because the wholesale drivers struck in violation of a "no strike" clause in their contract. The "no strike" clause is contained in the section of the contract entitled "Grievance Procedure" which defines a "grievance" as "any controversy, complaint, misunderstanding or dispute . . . arising between the Company and the Union or an employee represented by the Union". The contract provides that any "grievance" will be subject to a three-step procedure, from shop steward to arbitrator. It further provides,

> "If the Company fails to comply with the award of the Arbitrator or with the procedures of this Article, the Union has a right to take all legal and economic action to enforce compliance.
>
> ". . . There shall be no strike, work stoppage or interruption of work during the term of this Agreement unless the Company shall refuse to comply with an arbitration award pursuant to arbitration proceedings instituted in accordance with the terms of this Article."

In deciding whether this portion of the contract prohibits the sympathy strike at issue here, we begin with the holding in *Mastro Plastics Corp.* v. *NLRB,* 350 U.S. 270, 281 (1956), that a similar no-strike clause was not to be given a literal interpretation but was to be read in the context of the whole contract and in "light of the law under which the contract was made." The Court has also stated that it is appropriate for the Board to interpret contract terms when necessary to its role of enforcing the Act. *NLRB* v. *C & C Plywood Corp.,* 385 U.S. 421, 428-29 (1967). If the Board's interpretation has a reasonable basis in the contract terms, the Act's policies and the Board's expertise, it is entitled to deference. *See id.* at 430-31: *Newspaper Production Co., supra,* 503 F.2d at 830.

In the present case, the Board's interpretation finds support in several rationales. In *Mastro Plastics Corp., supra,* employees protesting the employer's illegal attempted ouster of their union as collective bargaining representative ostensibly violated the broad "no strike" clause. The Supreme Court noted that the "no strike" pledge was to be read in the context of a contract which "assume[d] the existence of a lawfully designated bargaining representative" and was plainly "aimed at avoiding interruptions of production prompted by efforts to change existing economic relationships." 350 U.S. at 282. Viewing the "no strike" clause, in context, as logically limited to stoppages over economic issues properly the subject of collective bargaining or arbitration, the Court held that there was "no adequate basis for implying [the] existence" of a waiver of the right to strike over unfair

labor practices undermining the collective bargaining relationship. *Id.* at 283. Later circuit cases have held that waivers of the right to strike against unfair labor practices must be in "clear and unmistakable language." *Newspaper Production Co., supra,* 503 F.2d at 830; *Kellogg Co.* v. *NLRB,* 457 F.2d 519, 525 (6th Cir.), *cert. denied,* 409 U.S. 850 (1972). There is in the present "no strike" clause and contract no such clear and unmistakable waiver.

The present case is, to be sure, distinguishable from *Mastro Plastics* in that here the employer's unfair labor practices were destructive of the union's status only in another bargaining unit. Nevertheless, the right to engage in an unfair labor practice sympathy strike is protected under § 7; waiver of the right is not lightly to be inferred. And the wholesale drivers' contract containing the "no strike" clause plainly does not contemplate processing the mechanics' grievance through the wholesale drivers' arbitration machinery. *See Buffalo Forge Co.* v. *Steelworkers,* 428 U.S. 397, 407-08 (1976). There is thus a close parallel between this case and *Mastro Plastics.*[2]

[2] *NLRB* v. *Rockaway News Supply Co.,* 345 U.S. 71 (1953), relied on by the employer, is not controlling. That case not only preceded *Mastro Plastics* but also involved an employee's refusal to cross a stranger union's picket line at another employer's plant. Such a "sympathy strike" is of considerably less importance under the Act than one directed at a common employer and provoked by serious unfair labor practices. See note 1 *supra.*

We ascribe little weight to the employer's argument that the bargaining history behind the "no strike" clause reveals that the union was waiving its right to strike even over serious unfair labor practices directed at another bargaining unit at the employer's plant. It is true that the union was unable to obtain the employer's assent to a contract containing a broadly phrased "preservation of rights" clause which would have permitted the union to honor sister locals' picket lines at the company's and other employers' premises. The inference to be drawn, however, is not that the union thereby agreed to incorporate the converse in the "no strike" clause. The more reasonable interpretation is that the parties left the "no strike" clause to be interpreted according to the existing principles of law in this area, with the union

By the same token, the Board's interpretation of the "no strike" clause is supportable in light of the familiar principle that a no-strike provision is ordinarily coterminous with the duty to arbitrate. *E.g., Gateway Coal Co.* v. *UMW,* 414 U.S. 368, 382 (1974); *Gary Hobart Water Corp.* v. *NLRB,* 511 F.2d 284, 287 (7th Cir.), *cert. denied,* 423 U.S. 925 (1975). Since the dispute underlying the work stoppage — that between the mechanics and the employer — could not be processed through the wholesale drivers' grievance machinery, there was no duty to arbitrate, and the "no strike" clause did not bar the sympathy strike.

The employer, however, argues that the wholesale drivers violated their contract since the applicability of the "no strike" clause to the wholesale drivers' sympathy walkout is itself an arbitrable issue. In *Buffalo Forge Co., supra* at 405, it was recognized that the scope of such pledges may itself present an arbitrable question. However, it does not follow that the application of the clause in the present case was arbitrable. The contract between Buckley and the wholesale drivers provides that the arbitration machinery may be activated where the "aggrieved employee or employees" first "present the grievance to the Shop Steward within five (5) working days after the reason for the grievance has occurred . . . ." The contract then provides steps for further processing of the grievance,

free to engage in a sympathy strike against unfair labor practices committed by the employer but barred from honoring picket lines at another employer's plant. *Compare Mastro Plastics Corp.* v. *NLRB,* 350 U.S. 270 (1956), *with Rockaway News Supply Co., supra.* Nor does the ambiguous testimony of the union business agent, cited by the employer, require a different interpretation. "Where a provision would normally be implied in an agreement by operation of the Act itself . . . we think a waiver should be express, and that a mere inference, no matter how strong, should be insufficient." *NLRB* v. *Perkins Machine Co.,* 326 F.2d 488, 489 (1st Cir. 1964). Not only was there no express waiver in this case, but the inferences supporting the employer's position are inconclusive.

culminating in arbitration. Nowhere in the "Grievance Procedure" section of the contract containing the "no strike" clause is there provision for employer initiation of grievance procedures or arbitration. *Compare Buffalo Forge Co., supra* at 400 & n.2. Since the claimed violation of the "no strike" pledge is itself the employer's rather than the union's grievance, and since no provision is made for arbitration of such a "grievance", we have some difficulty seeing how the union violated an implicit or explicit pledge to arbitrate this issue.[3] And, on the merits, it seems unlikely that an arbitrator, even if he took jurisdiction, would construe the "no strike" clause in a manner different from the Board's interpretation in this case. There is no "picket line" clause, *see NLRB* v. *Keller Crescent Co.*, 538 F.2d 1291 (7th Cir. 1976), and neither the law nor the bargaining history provides significant support for an interpretation of the clause barring the sympathy strike at issue here.

A court, to be sure, cannot confidently predict how an arbitrator might see these matters, although we believe it our duty to make a threshold determination in these circumstances, *Mastro Plastics Corp.* v. *NLRB, supra; NLRB* v. *C & C Plywood Corp., supra.* But even assuming that the scope of the "no strike" clause were arbitrable, we do not think that the employer is in a good position to complain that the issue was not arbitrated. The company points to nowhere in the record, and we have discovered none, where evidence indicates that the employer called

[3] The majority and the dissenters in *Buffalo Forge Co.* v. *Steelworkers*, 428 U.S. 397 (1976), appear to agree that it is appropriate for federal courts in the first instance to determine whether "the strike was . . . *over* any dispute between the Union and the employer that was even remotely subject to the arbitration provisions of the contract." *Id.* at 407 (opinion of the Court); *see id.* at 431 (Stevens, J., dissenting). It is also competent in this case for the Board and the court to perform a similar function with respect to the contract at issue here.

to the union's attention the breach of its "no strike" pledge or demanded arbitration on this issue. As noted above, existing law holds the type of sympathy strike involved here not a violation of a broad "no strike" promise and there is nothing in the bargaining history or terms of the contract to put the union on notice that a different interpretation could be placed on the clause. *Compare NLRB* v. *Keller Crescent Co., supra.* In these circumstances, it is hardly equitable for the employer to play dog in the manger: the company itself should have recognized and raised the arbitrability issue at the appropriate time if it later wished to argue the lack of arbitration as a ground for refusing to rehire the strikers.

Finally, assuming again that the scope of the "no strike" pledge was arbitrable, it is by no means clear (although we do not decide the point) that the union was under a duty not to strike pending resolution of the question by an arbitrator. In *Buffalo Forge* the Supreme Court noted that a "no strike" pledge would be implied only with respect to issues "over" which a union had agreed to arbitrate. 428 U.S. at 407. And the Court stated further that an injunction against a strike in violation of such a pledge would ordinarily be appropriate to protect the employer's quid pro quo and the arbitral process itself. Since the Court in *Buffalo Forge* barred an injunction against a sympathy strike even where the scope of the "no strike" clause was itself concededly arbitrable, it is questionable whether the union could be said to have impliedly agreed not to strike pending arbitral resolution of the scope of the "no strike" clause.

We have examined the other points raised by the employer and find them to be without merit.

Enforcement granted.

Appendix B.

227 NLRB No. 147

D — 1981
Worcester, Mass.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

C. K. SMITH & CO., INC.
AND
TEAMSTERS LOCAL 170, A/W INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

CASES 1—CA—9817 AND 1—CA—9818

C. K. SMITH & CO., INC./BUCKLEY HEATING CO., INC. (GASOLINE DIVISION)
AND
TEAMSTERS LOCAL 170, A/W INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

CASE 1—CA—10184

Decision and Order

On July 16, 1976, Administrative Law Judge Jerry B. Stone issued the attached Decision in this proceeding.

Thereafter, Respondents, Charging Party, and General Counsel filed exceptions and supporting briefs.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondents, C. K. Smith & Co., Inc., and Buckley Heating Co., Inc. (Gasoline Division), Worcester, Massachusetts, their officers, agents, successors, and assigns, shall take the action set forth in said recommended Order, except that the attached

[1] The Respondents, Charging Party, and General Counsel have excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an Administrative Law Judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (C.A. 3, 1951). We have carefully examined the record and find no basis for reversing his findings.

notice is substituted for that of the Administrative Law Judge.

Dated, Washington, D.C. January 14, 1977

BETTY SOUTHARD MURPHY,
Chairman

JOHN H. FANNING,
Member

JOHN A. PENELLO,
Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

Notice to Employees

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL recognize Teamsters Local 170, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the exclusive collective-bargaining representative of employees in C. K. Smith & Co., Inc.'s mechanics unit set out below.

WE WILL bargain collectively upon request with Teamsters Local 170, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the exclusive collective-bargaining representative of employees in the appropriate bargaining units set out below, and embody any understanding reached in a signed agreement.

WE WILL NOT withdraw recognition from and refuse to bargain collectively with Teamsters Local 170, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, with respect to rates of pay, hours, and other conditions of employment of C. K. Smith & Co., Inc.'s employees in the appropriate bargaining unit of mechanics set out below.

WE WILL NOT bargain directly with individual retail driver employees of C. K. Smith & Co., Inc., in derogation of the rights of Teamsters Local 170, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the bargaining representative of employees in the retail drivers bargaining unit set out below. The appropriate bargaining units are:

1. All mechanics and warehousemen of C. K. Smith & Co., Inc., employed at its Worcester plant, exclusive of all other employees and supervisors as defined in Section 2(11) of the Act.

2. All retail truck drivers of C. K. Smith & Co., Inc., at its Worcester plant, exclusive of all other employees and all supervisors as defined in Section 2(11) of the Act.

WE WILL NOT coercively interrogate our employees concerning their union membership, activities, or desires.

WE WILL NOT promise our employees adjustments in working conditions to dissuade their support of the Union.

WE WILL NOT threaten our employees with loss of work opportunity to dissuade their support of the Union.

WE WILL offer immediate and full reinstatement to the employees listed below to their former positions or, if such positions no longer exist, to substantially equivalent posi-

tions, without prejudice to their seniority or other rights previously enjoyed, and WE WILL make them whole for any loss of pay or other benefits, including interest at 6 percent per annum, suffered as a result of the refusal on July 9, 1974, and thereafter, to promptly reinstate such employees upon their unconditional offer to return to work on July 8, 1974, from an unfair labor practice strike engaged in by such employees:

Clyde Whitaker	William Paige
David Plante	Edward Commo
Joseph Luksha	Harry Wilson
Thomas Crilly	James Wadowski
Richard Erickson	Raymond Flagg
David Bedard	Richard Castonguay, Sr.
Arthur Lewis	Douglas C. Morrison
Stanley MacDonald	Gregorio Santoro
Bruce Hathaway	Robert Luby
Richard Cook	Raymond Desy

WE WILL NOT discourage membership in or activities on behalf of Teamsters Local 170, or any other labor organization, or the engaging in protected concerted activities, by refusing to reinstate unfair labor practice strikers upon their unconditional offer to return to work.

WE WILL NOT in any other manner, interfere with, restrain, or coerce our employees in the exercise of their rights to engage in organizational activities or in collective bargaining, or to refrain from such activities.

All our employees are free to become or remain, or refrain from becoming or remaining, members of any labor organization, except to the extent provided by Section 8(a)(3) of the Act.

C. K. SMITH & CO., INC., AND
BUCKLEY HEATING CO., INC.
(GASOLINE DIVISION)
(Employer)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 12th Floor, Keystone Building, 99 High Street, Boston, Massachusetts 02110, Telephone 617 — 223-3348.

JD-484-76
Worcester, MA

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

C. K. SMITH & CO., INC.
AND
BUCKLEY HEATING CO., INC. (GASOLINE DIVISION)
AND
TEAMSTERS LOCAL 170, a/w INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

Cases 1-CA-9817
1-CA-9818
1-CA-10184

Thomas J. Flynn, Esq., and *Avrom Herbster, Esq.*, for the General Counsel.

Christy A. Pano, Esq., and *Peter F. Keenan, Jr., Esq.*, of Worcester, MA, for the Charging Party (Union).

Paul J. Kingston, Esq., of Boston, MA, for the Employer (Respondent).

Decision

Statement of the Case

Jerry B. Stone, Administrative Law Judge: This consolidated proceeding, under Section 10(b) of the National

Labor Relations Act, as amended, was tried pursuant to due notice on November 17, 18 and December 8, 9, 11, 12, 13, and 14, 1975, at Worcester, Massachusetts.

The charges in Cases 1-CA-9817 and 1-CA-9818 were filed on May 13, 1974. The charge in Case 1-CA-10184 was filed on October 22, 1974. The amended charge in Case 1-CA-10184 was filed on January 2, 1975. The amended consolidated complaint in this matter was issued on June 24, 1975.

The issues concern (1) whether the Respondents constitute a single employer within the meaning of the Act; (2) whether the Respondents have engaged in conduct violative of Section 8(a)(1) of the Act by interrogation of employees concerning their membership in or activities on behalf of the Union, by threatening employees with loss of employment or job security or working conditions because of their membership in or activities on behalf of the Union, and by promising adjustments in working conditions if there were no Union; (3) whether the Respondents have engaged in conduct violative of Section 8(a)(5) and (1) by refusing to bargain collectively with the Union; (4) whether the Union is an exclusive collective-bargaining agent in a certain bargaining unit; (5) whether a strike was an unfair labor practice strike, an economic strike, or unprotected unlawful strike in whole or in part as regards certain employees on strike; and (6) whether the Respondents have violated Section 8(a)(3) and (1) of the Act by refusing to reinstate certain strikers upon their unconditional offer to return to work.

The Respondents, prior to trial, filed a motion to dismiss certain allegations of the complaint. The motion was predicated in effect upon a contention that charges were not sufficient to constitute charges filed within the 10(b) period for the purpose of the complaint allegations per-

taining to the issues, primarily the issues relating to an alleged unfair labor practice strike and to the alleged refusal to reinstate unfair labor practice strikers. The Respondents' motion to dismiss such complaint allegations was dismissed. Respondents' interim-appeal to such ruling was denied by the Board. The Respondents have in effect reiterated in brief that such complaint allegations are barred by Section 10(b) of the Act.

I find no merit to such Respondents' contentions and adhere to the rulings made at the trial. The complaint alleges that Respondents (Buckley and Smith) have engaged in certain conduct violative of Section 8(a)(5) and (1) of the Act. Such conduct is alleged to have occurred on or after March 1 and on dates thereafter and well within the 6-month period preceding May 13, 1974, the date 8(a)(5) and (1) charges were filed in Cases 1-CA-9817 and 1-CA-9818 against C.K. Smith & Co., Inc. The charges contained in effect specific 8(a)(5) allegations and general 8(a)(1) allegations. It is clear that the 8(a)(5) and (1) complaint allegations are closely related to the charges as filed and are timely within the meaning of Section 10(b) of the Act. Service upon one corporation, part of a single employer enterprise, is sufficient to support complaint allegations of a single-employer respondent. As found later herein, Buckley and Smith constitute a single employer within the meaning of the Act. Further, on October 22, 1974, the Union filed an unfair labor practice charge in Case 1-CA-10184 against the single employer, Smith and Buckley, and alluded therein in effect to the labor dispute between the employer and employees in the bargaining units other than the unit specifically involved in Case 1-CA-10184. Such charge, in and of itself, is sufficiently related to the charges in Cases 1-CA-9817 and 1-CA-9818 to constitute proper notice by amendment of the single-employer contention.

Thus, the charges in Cases 1-CA-9817 and 1-CA-9818 properly form a basis for the complaint allegations of conduct violative of Section 8(a)(1) and (5) of the Act. Such conduct alleged as having occurred timely with respect to the date of filing of such charges on May 13, 1974, forms a proper basis for determining whether a strike occurring on April 29 through July 8, 1974, is an unfair labor practice strike as alleged in the complaint.

The complaint alleges in effect that the Respondents have failed and refused to reinstate certain employees since on or about July 9, 1974, because they participated in an unfair labor practice strike. The amended charge in Case 1-CA-10184 was filed on January 2, 1975. The complaint allegations are within the 10(b) period of such charge. The amended charge (Case 1-CA-10184) in part alleges conduct violative of Section 8(a)(3) and (1) of the Act by refusal to reinstate certain named employees. The complaint allegations of refusal to reinstate unfair labor practice strikers are sufficiently related to the charges as filed. Although, as the record reveals, the individuals named in such charge were Buckley wholesale drivers, the question of refusal to reinstate all of the unfair labor practice strikers (including employees who were "retail drivers" and "mechanics") is properly encompassed since the alleged violation is of the same class of violation involved in the charge. In sum, the complaint allegations are based upon proper charges.[1]

All parties were afforded full opportunity to participate in the proceeding. Briefs have been filed by all parties and have been considered.

---

[1] *N.L.R.B.* v. *Fant Milling Company*, 360 U.S. 301 (1959); *Southern Materials Company*, 181 NLRB 958.

Upon the entire record in the case and from my observation of witnesses, I hereby make the following:[2]

Findings of Fact

I. The Business of the Employer
Single-Employer Status

A. *Undisputed Facts*

C.K. Smith & Co., Inc., herein sometimes referred to as Respondent Smith or Smith, is and has been at all times material herein a corporation duly organized under and existing by virtue of the laws of the Commonwealth of Massachusetts.

Buckley Heating Co., Inc. (Gasoline Division), herein referred to sometimes as Respondent Buckley or Buckley, is and has been at all times material herein a corporation duly organized under and existing by virtue of the laws of the Commonwealth of Massachusetts.

At all times material herein Respondent Smith has maintained its principal office and place of business at 99 Crescent Street, Worcester, Massachusetts (herein called the Worcester plant).

At all times material herein, Respondent Buckley has maintained its principal office and place of business at 99 Crescent Street, Worcester, Massachusetts (herein called the Worcester plant).

---

[2] An order, marked as ALJ Ex. No. 1, dated May 26, 1976, wherein the record was corrected in part, is hereby received into the record. Proof of service of such order is attached thereto and a part of ALJ Ex. No. 1.

Respondents, Smith and Buckley, at all times material herein, have been engaged in the sale and distribution of gasoline, oil and related products at the said Worcester plant.

Respondents (Smith and Buckley) in the course and conduct of their business cause, and continuously have caused at all times material herein, large quantities of gasoline and oil used by them in the conduct of their business to be purchased and transported in interstate commerce from and through various States of the United States other than the Commonwealth of Massachusetts.

Respondents (Smith and Buckley) in the course and conduct of their business annually receive gasoline and oil valued in excess of $50,000 at their Worcester plant from points located outside the Commonwealth of Massachusetts.

B. *Disputed Issue*
The Single-Employer Issue

The General Counsel alleges and the Respondents deny that "Respondent Smith and Respondent Buckley (herein jointly called Respondents) are, and at all times material herein have been, affiliated businesses with common ownership and operators and constitute a single, integrated business enterprise. The said owners and operators formulate and administer a common labor policy for the aforementioned companies affecting the employees of said companies."

At the trial of this matter, attempt was made to get the parties to narrow the issues and to stipulate to facts that were not in dispute. In this regard, Respondents' counsel indicated his willingness to stipulate to certain facts relating to the single-employer issue but his unwillingness to stipulate to a legal conclusion that the Respondents constituted a single employer. Dialogue between counsel ensued with apparent agreement to meet outside the proceeding and to

develop some factual stipulations. Despite this, no stipulations of fact were presented into the record concerning the single-employer issue.

The pleadings and the evidence clearly establish that James Smith is President of both Respondent Smith and Respondent Buckley, and that David J. Adams is Vice President of both Respondent Smith and Respondent Buckley. The pleadings and the credited evidence as a whole clearly establish that both Respondents' place of business and offices are at the same location.

The General Counsel presented evidence concerning negotiations by the Union with Respondents Buckley and Smith, certain statements made by President Smith and Vice President Adams to employees, and some evidence concerning the business and operations of the Respondents. The Charging Party's questioning of witnesses was in the same vein. Respondents' counsel questioned witnesses in the same area of evidence.

It is clear from such evidence that President Smith and Vice President Adams are engaged generally in the management of both Respondents on a day-by-day basis. It is also clear in effect that Respondent Buckley is essentially engaged in the sale and wholesale distribution of oil and related products. The credited evidence also reveals that both President Smith and Vice President Adams handle labor relations interchangeably and for both Respondents.

Although limited evidence was presented concerning specifics of labor policy as directed to individual employees, it is clear that Respondents were concerned about the effect of labor relations of one Respondent upon the other Respondent. Thus, Vice President Adams credibly testified in effect that he was concerned over the inclusion of a "protection of rights" clause in a contract for one of the Respondents because of the effect of the same on the other Respondent.

As indicated, despite assertion of Respondents' counsel that he was willing to stipulate to certain facts relating to the single-employer issue, the parties did not enter into such stipulation.

In the presentation of Respondents' case, Respondents' counsel went into some issues for which evidence touched in a minor way the single-employer issue. The General Counsel and Charging Party attempted to broaden the cross-examination of such witnesses into the general single-employer issue. The Respondents objected to the examination of witnesses on the single-employer issue and contended that Respondents had not gone into the single-employer issue.[3] The cross-examination of such witnesses was limited to the matter gone into on direct. Although Respondents were attempting to avoid going into the single-employer issue, where subject matter is gone into which overlaps or touches upon such issue, evidence elicited must be considered as to all issues. This is the risk of litigation. The area of cross-examination was limited but did adduce evidence which touches upon the single-employer issue. Thus, credited evidence was adduced which revealed that Messina, a supervisor of Respondent Smith, was concerned in 1972 about a strike by Respondent Buckley's drivers because of the effect on the ability of Respondent Smith to deliver oil. Further, credited evidence reveals that Respondent Smith's Supervisor Carlson interviewed prospective employee Witt when he was hired for a job for Respondent Buckley during the April 29 — July 8, 1974, strike involved in this case.

Considering all of the foregoing, I conclude and find that the facts reveal that Respondent Buckley and Respondent

[3] I would note that the General Counsel made no contention that the question of "stipulation" had been inadvertently overlooked.

Smith constitute a single employer within the meaning of the Act. Thus, the facts reveal that the Respondents share the same location and have their businesses and offices at the same location. Respondents have the same officers. James Smith is President of both Respondents. David J. Adams is Vice President of both Respondents. Both President Smith and Vice President Adams are engaged in daily management of both Respondents. Both President Smith and Vice President Adams are engaged in the handling of labor relations for both Respondents. In the handling of labor relations matters for one Respondent, concern is given for the effect of such labor relations on the other Respondent. There is no question that there is common ownership of the two Respondents. Although the issue of whether there is common ownership of both Respondents is presented by the pleadings, it is not a genuine issue. Perhaps the Respondents denied the complaint allegations as to the single-employer issue because the allegations were broad and included other matter. Since Respondents' counsel stated at the trial that there is common ownership of the two Respondents, it would appear that the answer should have admitted in part and denied in part the allegations. Statement by counsel at a trial as to such matter that is not really disputed can properly be considered as a statement narrowing the issues, or as an admission of a fact. I so construe the statement of Respondents' counsel that there is common ownership of the Respondents.

The facts reveal in effect that from the same location Respondents operate through Respondent Buckley the sale and distribution on a wholesale basis of oil and related products, and through Respondent Smith the sale and distribution of retail oil and related products.

Although the Board and Court normally give weight to a combination of the criteria of common ownership, common

management, centralized control of labor relations, and interrelationship of the enterprise, it does not always give the same weight to each criteria, nor does it always find that each criteria is essential. In situations where the types of businesses are essentially similar, as here where the distinction is one of "wholesale" or "retail," the criteria of common ownership, management, centralized control of labor relations, and location of the enterprises have been accorded controlling weight. In sum, the facts here reveal in effect one enterprise with divisions of the same engaged in "wholesale" and "retail" distribution of oil and related products. The overall facts reveal Respondent Buckley and Respondent Smith to constitute a single employer within the meaning of the Act,[4] and engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

II. The Labor Organization Involved

Teamsters Local 170, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is and has been at all times material herein a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

A. *The Setting*

Many of the facts and some of the issues in this proceeding are not disputed, are admitted in the pleadings, are

[4] *Arlington Ridge Development Co., etc.*, 203 NLRB 787; *Barwise Sheet Metal Co.*, 199 NLRB 372; *Triangle Maintenance Corporation*, 186 NLRB 538; and *State Lathing Co., Inc.*, 153 NLRB 1189.

stipulated to, or established by overwhelming evidence. For a brief look at the setting and the issues I find it proper to set forth the following statements as to the setting and issues.

Respondents operate an enterprise from a plant location in Worcester, Massachusetts. Respondent Buckley is engaged in the wholesale sale and distribution of oil and related products. Respondent Smith is engaged in the retail sale and distribution of oil and related products. Respondent Buckley has had a collective-bargaining relationship and collective-bargaining contracts with Local 170 of the Teamsters concerning what may be described as a wholesale drivers bargaining unit. During the first months of 1974, the Respondent and the Union had not finalized a new collective-bargaining contract for such unit but did so on March 22, 1974. Respondent Smith has had a collective-bargaining relationship and collective-bargaining contracts with Local 170 of the Teamsters concerning a unit of retail drivers. During the early months of 1974, Respondent Smith and the Union were involved in negotiations for a new collective-bargaining agreement for this unit. Involved in this case is a question as to whether an agreement was reached for a new contract around April 12, 1974, whether Respondent later refused to sign such contract and whether Respondent earlier engaged in direct bargaining with unit employees.

In the early months of 1974, Respondent Smith's employees in a unit of employees described herein as the "mechanics" unit were not represented by a union. Some union activity directed to the unionization of such employees commenced in early March, 1974. Contact was made by Union Representative Gentile, of Teamsters Local 170, with Respondent Smith's Vice President Adams concerning the Union's claim for representation. Involved

in this case is whether the Respondent thereafter engaged in certain acts violative of Section 8(a)(1) of the Act by acts of interrogation, promises of benefits, and threats of reprisals. Involved also are questions of whether Respondent recognized the Union as exclusive collective-bargaining representative of such employees and later withdrew such recognition.

Involved in this case are also questions as to whether a strike by employees in all of the above referred to bargaining units was an unfair labor practice strike caused by the alleged unlawful interrogation of employees in the mechanics unit, by Respondents' direct bargaining with employees in the retail drivers unit, by Respondents' refusal to sign an agreed upon contract involving the retail drivers, and by Respondents' withdrawal of recognition concerning the "mechanics" unit. Involved also are certain issues concerning whether certain contract clauses affect employee rights to strike, whether certain employees were unfair labor practice strikers, and whether the Respondent has discriminatorily refused to reinstate certain of the striking employees upon their unconditional offer to return to work after the strike.

B. *Preliminary Facts*

1. The pleadings, admissions therein and stipulations of the parties establish that:

At all times material herein, the following named persons occupied the positions set opposite their respective names and have been and are now agents of the Respondents acting on their behalf and are supervisors within the meaning of Section 2(11) of the Act:

James Smith	—	President of Smith; President of Buckley
David J. Adams	—	Vice President of Smith; Vice President of Buckley
Vincent Messina	—	Sales Manager, Industrial Fuel Division, C.K. Smith

2. The pleadings and admissions therein, and the overall facts establish that:

All retail truckdrivers of Respondent Smith employed at its Worcester plant, exclusive of all other employees and all supervisors as defined in Section 2(11) of the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

Prior to and in January of 1974, Respondent Smith and the Union were parties to a collective-bargaining agreement covering the employees in the unit described above.[5]

At all times material herein, the Union has been the representative for the purpose of collective bargaining of a majority of the employees in the unit described above and, by virtue of Section 9(a) of the Act, has been and is now the exclusive representative of all the employees in the said unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment.

3. The pleadings and admissions therein and the overwhelming evidence establish that:

All drivers, warehouse employees and helpers of Respondent Buckley employed at its Worcester plant, exclusive of all other employees and all supervisors as defined in

[5]The facts are clear that the contract in effect around January, 1974, was due to expire around that time and that bargaining for a new contract started around that date.

Section 2(11) of the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

The overwhelming evidence reveals that Respondent Buckley and the Union have had a collective-bargaining relationship with respect to the above bargaining unit at all times material herein, that the latest current collective-bargaining agreement concerning such unit was executed on March 22, 1974, and was in existence at all times material thereafter.

There is no issue that the Union is the exclusive collective-bargaining representative of the employees in such bargaining unit, and by virtue of such contractual relationship, it is concluded and found that the Union is the exclusive collective-bargaining representative of the employees in the above collective-bargaining unit.

4. The pleadings and admissions therein as amended at the trial establish that:

All mechanics and warehousemen of Respondent Smith employed at its Worcester plant, exclusive of all other employees and all supervisors as defined in Section 2(11) of the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

Although in issue is whether the Union is the appropriately designated exclusive collective-bargaining representative of the employees in the above appropriate collective-bargaining unit, the facts overwhelmingly establish that the Union has been the exclusive collective-bargaining representative since March 16, 1974.

The parties' stipulations and the evidence clearly establish that there were six employees in the above-described appropriate collective-bargaining unit on March 16, 1974, and thereafter at all times material to this proceeding up to the date of the strike on April 29, 1974. On March 16, 1974,

the six said employees (Santoro, Morrison, Luby, Desy, Castonguay and Flagg) signed cards authorizing the Union to represent such employees in collective bargaining.[6] It is clear and I conclude and find that the Union (Teamsters Local 170) was the exclusive collective-bargaining representative of the employees in the above appropriate collective-bargaining unit on March 16, 1974, and at all times material to the issues in this case.

5. The pleadings, admissions therein, and the evidence clearly establish that the employees in the appropriate collective-bargaining units described in paragraphs 2, 3, and 4 above, ceased work concertedly and went out on strike on April 29, 1974, that such strike continued through July 8, 1974, and that on July 8, 1974, said employees made an unconditional offer to return to work.

C. *Interference, Restraint and Coercion, Refusal to Bargain, Direct Bargaining with Employees*

The General Counsel alleges in effect and Respondents deny that the Respondents, since on or about March 1, 1974, bargained directly and individually with their employees in the C.K. Smith retail drivers unit (described above in III B 2) concerning rates of pay, wages, hours of employment, or other conditions of employment. The General Counsel alleges and contends that such conduct is violative of Section 8(a)(5) and (1) of the Act.

[6] The facts are based upon a composite of the credited testimony of Gentile, Santoro, Morrison, Luby, Desy, and Castonguay.

Although the above issues are disputed by the pleadings and briefs, the facts overwhelmingly reveal that the facts support a finding of violative conduct as alleged.

The principal witnesses to the issues as to such violative conduct are Wadowski, Wilson, and President Smith. The facts as to the critical issues are based upon a composite of the credited aspects of such witnesses' testimony and a logical consideration of the totality of all of the facts.

In January of 1974, the Respondents had a collective-bargaining agreement between C.K. Smith Co., Inc., and the Union concerning the retail drivers unit. The contract was due to expire around February 25, 1974.[7] In January of 1974, Union Representative Gentile held a meeting with employees in the retail drivers unit and thereafter on January 14, 1974, submitted proposals for certain provisions to be included in a new contract to be negotiated. For the purpose of this issue, it is clear that the Union and the Respondent engaged in contract negotiations for a new contract covering the retail drivers unit during the period of time from January 14, 1974, to April 18, 1974.

For the purpose of resolution of the issue involved herein it may be said that it is clear that the Respondents, during negotiations, desired to have a clause, described as the "stand-by" clause, removed from the collective-bargaining contract with the Union. This clause in effect provides that one of the bargaining unit employees would be on stand-by for call to deliver oil to customers if customers ran out of oil at night. Gentile, who was new at his job as a representative, first indicated to the Respondents that he would be willing to delete such clause from the contract. Millet, a

[7] The facts are based upon a composite of testimony of Gentile and Adams, exhibits as regards proposed contracts, and Respondents' answers to the complaint and amended complaint.

higher official of the Union, indicated to Gentile that he could not agree to such exclusion, and Gentile conveyed to the Respondents that continuation of such clause in the contract was necessary. It appears that the inclusion or exclusion of such clause in the contract did not appear to be of great importance to the employees in the bargaining unit. However, it appears that there had been grievances filed concerning past application or nonconformance with such clause. In essence, the Union considered that exclusion of such clause constituted a possible loss of bargaining unit work.

While Respondents (C.K. Smith & Co., Inc.) were negotiating with the Union over the inclusion or exclusion of such clause and over a new contract, President Smith had conversations with two of the three employees in the retail drivers unit wherein he discussed the question of exclusion of the stand-by clause in the new contract.[8]

Thus the facts are clear that employee Wadowski, in March of 1974, let it be known to President Smith that he was interested in receiving full employment rather than seasonal employment. President Smith told Wadowski in effect that he would see that he received full employment by his being placed on the "green machine," a fertilizer truck, but that this was contingent upon Respondents' getting the "night call" and "stand-by" provisions out of the upcoming contract. Smith and Wadowski also discussed in effect what the "money" terms in the contract would be. Later Wadowski, an employee in the retail drivers bargaining unit, voted in a union meeting against the contract proposals being considered because the "money" items were not what he had thought President Smith had indicated to

[8] These conversations took place at Respondents' place of business, at the gas pumps, in the yard, the drivers' rooms, or in the locker room.

him. Later President Smith and Wadowski had another conversation concerning the contract proposals. During this discussion Smith mentioned certain hourly figures for work, and Smith ultimately indicated that he couldn't give the hourly rate wanted by Wadowski but would see that certain overtime work was available.

During the time that the Union and the Respondents were negotiating a new contract for the retail drivers, President Smith and Wadowski had another conversation concerning overtime work. Thus, Wadowski complained to Smith that he wasn't receiving the overtime work Smith had promised him. At this time Smith told Wadowski that the deal was off because the Union had not taken the "stand-by" and "night call" provisions out of the contract.

As indicated, the facts are clear that President Smith engaged in direct bargaining with employees in the retail drivers unit at the same time that bargaining negotiations were going on between the Union and the Respondents. Smith's own testimony reveals that he had discussions with both employees Wilson and Wadowski to the effect that he would give Wadowski full employment if the "stand-by" clause were eliminated from the new contract.[9]

Considering the entire record and all of the foregoing, it is clear and I conclude and find that the Respondents, by President Smith, violated Section 8(a)(5) and (1) of the Act by bargaining directly with employees concerning rates of pay and conditions of employment at a time when Respondents were engaged in bargaining with the exclusive collective-bargaining representative of such employees concerning a new contract.

[9] Wadowski also testified to discussions with a contended supervisor apparently named Blount. It was made clear to the parties that the issues in this case would be those formally alleged. It is unnecessary for the disposition of the alleged issues to consider the testimony of Wadowski alluding to statements by Blount.

Respondents' main contention appears to be that it was taking the same position in bargaining with the Union as with the employees. Such contention is without merit. Bargaining directly with employees on a quid pro quo basis has the inherent effect of dividing, undermining and by-passing the Union as bargaining agent. Such conduct is clearly violative of both Section 8(a)(5) and (1) of the Act, and it is so found and concluded.

D. *Interference, Restraint and Coercion, Interrogation, Promises of Adjustments*

1 (a) The General Counsel alleged in his complaint and the Respondents denied in answer that the Respondents violated Section 8(a)(1) of the Act by "on or about March 11, 1974, by their officer and agent, David J. Adams, interrogating their employees concerning their membership in or activities on behalf of the Union."

(b) At the trial, the General Counsel amended his complaint to allege further that "on or about March 13, 1974, David Adams met with the mechanics and promised adjustments in working conditions if there were no union."

It is clear from the litigation of the issues that the events involved in these issues occurred on the same date, either March 11 or 13, 1974. Determination of exactly which date is correct is not necessary for the purpose of resolving such issues.

The witnesses presented by the General Counsel to these issues were Santoro, Desy, Flagg, Castonguay, and Morrison. Respondents' witnesses were Adams, Carlson, and Luby. Considering the cross-examination of various witnesses and the testimony of all witnesses, it is clear that the facts are revealed by piecing together fragments from the

testimony of all the witnesses. The General Counsel's witnesses on direct examination essentially testified to the "interrogation" issue. Desy and Morrison testified to statements made at the time by Adams relating to the promise of adjustments issue. Adams' testimonial version of the events was contradictory in effect of whether he had interrogated employees or had made promises of adjustments. Carlson's testimony in effect was not in detail and was corroborative in general effect of the General Counsel's witnesses as well as Adams. Luby's testimony on direct and cross-examination was contradictory of itself. Of critical significance in determining credibility, I note the following. General Counsel's witnesses alluded to Adams' reference of having been told by the union representative that the Union had a majority of the employees signed up. Adams testified in effect that he told the employees that the union representative had said he had 100 percent of the employees signed up. Carlson's testimony as a whole is corroborative of the General Counsel's witnesses' version as to what was said. Luby's testimony, as indicated, was contradictory of itself, and he presented himself as a witness apparently trying to present evidence in a light favorable to the Respondents. On cross-examination, however, Luby testified to the fact that Adams, at one point, did question the employees as to who had signed cards. The General Counsel's witnesses on these issues appeared to be fully frank, forthright and truthful. Considering all of the foregoing and the logical consistency of all of the facts, I am persuaded that Adams did interrogate the employees about signing cards and did make promises of adjustments. I note that in general Adams appeared a truthful witness. However, considering that Carlson's testimony as a whole is corroborative as to the question of whether Adams referred to Gentile's statement of a majority, and considering Luby's testimony

concerning Adams' questioning of employees, I find the testimony of General Counsel's witnesses on such points more reliable and trustworthy than the testimony of Respondents' witnesses contradictory thereof.

Considering the foregoing and the logical consistency of the facts, I find the facts as hereinafter set out. The testimony of any witness contradictory of the facts is discredited, based upon the foregoing and the logical consistency of the facts. The facts are based upon a composite of the credited aspects of the testimony of Santoro, Desy, Flagg, Morrison, Castonguay, Adams, Luby, and Carlson.

The facts are clear that Vice President Adams (of Respondent Smith) had a telephone conversation with Local 170's representative shortly before a meeting he had with the mechanics. In such conversation Gentile had claimed to either have a majority of the mechanics bargaining unit who had authorized the Union to represent them or to have 100 percent of such employees. This conversation between Adams and Gentile occurred on either March 11 or 13, 1974. Thereafter, on either March 11 or March 13, 1974, Adams had a meeting in the drivers' room with the mechanics (Santoro, Desy, Castonguay, Morrison, Flagg, and Luby). Present at such meeting with Adams was dispatcher Carlson.

Prior to the meeting that Adams had with the mechanics, employee Luby had requested Adams to have a meeting with the mechanics to discuss a question of cutback in hours, on Saturday work, and salaries.

Adams opened the meeting with the mechanics by telling them that he could not discuss salaries because he had a telephone call from Gentile of the Union. Adams told the mechanics that the matter was out of his hands, that Gentile claimed to represent a majority of the mechanics.

Adams asked the employees in effect to tell him who had signed union cards. Santoro stated in effect that he hadn't signed a card, that he hadn't turned one in. Luby was the only employee who stated that he had signed a union card. None of the other employees admitted that they had signed a union card. After Santoro stated that he had not signed a card, Adams asked in effect who had signed a card.

Adams told the employees in effect that he didn't care if they joined a union, that he was tired of having a gun at his head, that there was no sense in fighting if the Union had a majority, that if the Union had a majority, the others had better sign, that the innocent would suffer with the guilty, and that if a union were there, there would be set rules to follow and abide by. Adams then proceeded to a discussion of the strong points of the Teamsters Union and of another union. Adams told the employees that if they wanted to represent themselves, he would appoint Luby as their spokesman.

There was some discussion of conditions of work and discrepancy of pay. Adams told the employees that he knew everything was not right, that there was a communication problem, that a union would not help matters, and that adjustments could be made if there were not a union.

Adams told the employees to talk it over among themselves, that if they wanted to join a union, they could have one by 5:00, that he was going to have the "man" over.

Considering all of the foregoing, it is clear and I conclude and find that the Respondents, by Adams, on or about March 11 or 13, 1974, coercively interrogated its employees concerning their union activities or desires. Although the Union had prior thereto made a claim of representation, Adams did not limit his inquiry for such purpose, did not inform the employees that no reprisals would be taken, made promises of benefits if there were no union, and sug-

gested "self representation" with a representative designated by himself. Such interrogation certainly exceeded the bounds of permissible interrogation and was coercive in the total context thereof. Such conduct is clearly violative of Section 8(a)(1) of the Act. It is so concluded and found.

Considering all of the foregoing and all of the facts as set forth above and in the preceding section, I conclude and find that the Respondents, by Adams, on March 11 or 13, 1974, promised employees adjustments in working conditions if there were no union. Such conduct is violative of Section 8(a)(1) of the Act. It is so concluded and found.

E. *Interference, Restraint and Coercion*
Alleged Threat

The General Counsel alleges and the Respondents denied that "on or about April 15, 1974, James Smith threatened a mechanic that he would suffer loss of job security under a union contract."

The only witness presented with respect to this issue was Castonguay. Castonguay credibly testified to a conversation with President Smith at some point of time between March 13 and some time in April, 1974. The latter date reference was in regard to a time when Supervisor Messina (sale manager) spoke to employees in President Smith's presence. This latter occurrence is fixed by the totality of the evidence as occurring on April 22, 1974.

What occurred on the occasion that President Smith spoke to Castonguay, at some point of time between March 13 and April 22, 1974, is revealed by the following credited excerpts from Castonguay's testimony:

A. Correct, sir. I was alone in the garage and Mr. Smith came over and told me, he says, "you know, if you fellows go union," he says, "you've got more to lose."

I said, "what do you mean, Mr. Smith?"

He says, "if you're not the steward, the steward has preference of work," he says, "if things got slow, I'd have to lay you off." So I let that go in one ear and out the other.

Considering all of the foregoing, it is concluded and found that the Respondents, as alleged, violated Section 8(a)(1) of the Act by threatening an employee with loss of work opportunity if the Union were selected as exclusive collective-bargaining representative. I note that President Smith did not allude to or qualify his statement to Castonguay so as to reveal that the question of "super seniority" was dependent upon whether a contract was negotiated containing such clause. President Smith's statement, reasonably construed, conveyed to the employee the inevitability of a loss of employment opportunity if the Union were selected and thus was coercive in effect. Such conduct is violative of Section 8(a)(1) of the Act. It is so concluded and found.

F. *Interference, Restraint and Coercion*
Messina — Alleged Threat

The General Counsel alleged and the Respondents denied that "on or about April 22, 1974, Messina threatened the mechanics with loss of working conditions if the Union became their representative."

The witnesses to this issue were Santoro, Desy, Castonguay, Flagg, Morrison, Smith, and Messina.

It is sufficient to say that the testimony of General Counsel's witnesses, Santoro, Desy, Castonguay, and Flagg doesn't approach a factual basis for a finding that Messina made a threat of loss of working conditions in statements made by Messina to such employees on or about April 22, 1974.

The facts are clear that Messina spoke to the employees on or about April 22, 1974, about whether they should want a union or not.[10] Smith's and Messina's testimony was to such effect, was conclusionary, and may or may not have correctly covered in effect what was said.

The only witness whose testimony approaches a version that a "threat" may have been made was Morrison. Thus, Morrison testified that Messina had said in effect that if the employees joined a union, things wouldn't all be rosy. Morrison, however, testified that this was not Messina's word. Morrison's testimony as to the details as to what was said was to the effect as revealed from the following excerpts from his testimony:

> A. He said he knew that we wanted a union in there. He said that there were good things and bad things about the union, that we weren't even aware of at the time. But that we should take his word for it that there's things that could be ironed out without the union in there that should have been ironed out before maybe, maybe not. But should be discussed without having to go to such an extreme.

[10] Messina's conversation with the employees occurred in the "drivers room."

> Q. Did he tell you what some of the good things were about the union?
>
> A. He said that some of us might benefit in pay, but that was about the extent of it.
>
> Q. Did he tell you what some of the bad things were about the union?
>
> A. Yes, but I can't recall exactly what they were.

Considering all of the foregoing, I conclude and find that the facts are insufficient to reveal that the Respondent, by Messina, on April 22, 1974, threatened employees with loss of working conditions. Morrison's testimony, excepting for his own conclusions, reveals no statements indicative of loss of working conditions. Even if it is assumed that Messina made statements to the effect that everything wouldn't be rosy if the employees joined a union, the overall facts would reveal in effect that Messina was saying that there would be some good and some bad points for the employees to consider. In sum, the facts are insufficient to reveal that the Respondent, by Messina, engaged in conduct violative of Section 8(a)(1) of the Act by making threats of loss of working conditions.

G. *Alleged Interference, Restraint and Coercion*
Alleged Threat

The General Counsel alleged and the Respondents denied that Respondents violated Section 8(a)(1) of the Act by "on or about April 29, 1974, and on or about May 1, 1974, by telegram, threatening their employees with loss of employment because of their membership in or activities in behalf of the Union."

No evidence was presented in the record on this issue. Accordingly, it is concluded and found that the facts do not support and the General Counsel has failed to establish the violation as alleged.[11]

H. *Refusal to Bargain*
Withdrawal of Recognition — Mechanics Unit

The General Counsel alleges in effect and Respondents deny that Respondent Smith, on or about March 19, 1974, recognized the Union as exclusive collective-bargaining representative of the employees in an appropriate bargaining unit of mechanics (the mechanics bargaining unit described in III B 4 above). The General Counsel also alleges and the Respondents also deny that Respondent Smith, since on or about April 12, 1974, withdrew recognition of the Union as exclusive collective-bargaining agent of the employees in said bargaining unit and had continued

[11] The pleadings, motions, and argument by counsel at the trial revealed that there were many issues to be litigated and that the parties were arguing many points on a broad basis. The parties were advised that the issues litigated would be those formally alleged. In view of the foregoing, I note that witness Santoro testified to an alleged supervisor, Rijotte, having told him in effect that the Respondent would subcontract its work if the men went union. Such testimony was not responsive to the question asked and was stricken upon objection thereto. Santoro testified to a statement by Adams on March 22, 1974, to the effect that if there were a union, the men would have to go on a 40-hour week. No findings of violative conduct as to these statements are made. Santoro also testified that President Smith told him in effect that the Respondents would sign a 1-year contract and later hire a lawyer to get rid of the Union. Further, the evidence relating to the crucial issues is of such a nature that reliance upon this referred to testimony of Santoro is not necessary for the determination of the issues.

thereafter to refuse to bargain with the Union concerning the employees in said bargaining unit.

Resolution of these issues rides upon the determination of credibility conflicts between General Counsel's witnesses Gentile and Millet, and Respondents' witness Adams. Thus, Gentile credibly testified to the effect that a few days after March 20, 1974, Adams telephoned him and in effect at such time recognized the Union as collective-bargaining representative of the employees in the mechanics unit. Adams testified to the effect that he never recognized the Union as collective-bargaining representative of the mechanics unit. Gentile and Millet testified to the effect that on April 12, 1974, they engaged in negotiations with Adams concerning a contract for the mechanics unit. Adams testified in effect that no such negotiations occurred. Gentile testified in effect that in late April, 1974, Adams told him in effect that no agreement could be made on wages, that Respondent was going to cease bargaining and get a lawyer. Adams testified to the effect that no reference was made to the question of wages but that he did tell Gentile that the Respondent was getting a lawyer.

As to all of the facts concerning the question of recognition and repudiation, it may be said that much detail was presented by witnesses Gentile, Adams, Millet, and Smith. As indicated, the critical conflict is as set forth above.

Adams, Gentile, Smith and Millet all appeared basically as honest witnesses. However, I note that Adams in his testimony concerning whether he interrogated employees on March 11 or 13, 1974, did not appear to be a completely frank and forthright witness. Nor did Gentile appear as a completely frank and forthright witness as to all of his testimony. I note that Gentile, as a witness, appeared to take on the burden of pleading or presenting a legal position with regard to whether certain employees of Buckley were

"locked out" or on strike. It is sufficient to say that he was not believable as to such testimony. As to the questions of whether Gentile or Adams should be believed with respect to the question of "recognition," I found Gentile's testimony relative to such recognition and to bargaining concerning a mechanics contract to have the ring of frankness, forthrightness and truthfulness and to be more believable than Adams' denial thereof. Gentile's testimony on such points was full, in detail, and I credit his testimony over Adams' where in conflict on such point. In sum, I credit Gentile's testimony to the effect that Adams telephoned him and recognized the Union as exclusive collective-bargaining agent for the mechanics unit several days after March 20, 1974. I credit Gentile's and Millet's testimony to the effect that on April 12, 1974, Gentile and Millet negotiated with Adams over a mechanics' contract. I also credit Gentile's testimony to the effect that in late April, 1974, Adams informed him that the Respondents could not agree on wages, were ceasing bargaining and were getting a lawyer. I discredit the testimony of Adams inconsistent with the foregoing.

The major facts relevant to the question of whether Respondent Smith, on or about March 20, recognized the Union as exclusive collective-bargaining agent of the mechanics and later withdrew such recognition may be summarized as follows.[12]

Sometime, apparently shortly before or around March 8, 1974, union activity commenced among Respondent Smith's mechanics. Around March 8, 1974, or shortly before, Respondent Smith employed seven mechanics. Dolson, one

[12] The facts are based upon a composite of the credited aspects of the testimony of Gentile, Millet, Adams, and Smith, and logical consistency of the evidence. The basis for resolution of credibility disputes otherwise has previously been set forth.

of such employees, initiated union activity by getting union cards, signing one of such cards and getting other employees to sign union authorization cards. Dolson was discharged on March 8, 1974. As of Monday, March 11, 1974, Respondent had a mechanic employee complement of six employees. Three of the six employed employees had signed union authorization cards by March 11, 1974.[13]

The cards of the three employees (Santoro, Morrison, and Luby) and Dolson were turned over to Union Representative Gentile. Thereafter, on March 11 or 13, Gentile telephoned Adams, vice president of Smith, and told him that a majority of the employees had designated the Union as their exclusive collective-bargaining agent and demanded recognition.[14] Adams told Gentile in effect that if the Union had a majority of the employees signed up, the Respondent would recognize the Union as exclusive collective-bargaining representative of the employees.

As has been set forth before, Adams later had a meeting with the mechanics, related the effect of the Gentile-Adams telephone conversation, asked who had signed cards, was told in effect only that Luby had signed a union card, discussed the possibility of recognition of the Union (Local 170), of recognition of another union, and of self-representation with a person appointed by Adams serving as spokesman. At such meeting Adams told the employees to discuss it among themselves, that they could have a union by 5 o'clock. Afterward the mechanics held a meeting

[13] These preliminary facts are based upon a composite of the credited aspects of the testimony of Gentile, Dolson, Santoro, Morrison, and Luby. Luby's testimony inconsistent with the facts found is discredited as impeached by his sworn pretrial affidavit.

[14] Considering the logical consistency of all of the facts, I credit Gentile's testimony that he alluded to a "majority" over Adams' testimony that Gentile alluded to having 100 percent of the employees signed up.

among themselves. There is no evidence that any of the employees communicated to the Respondent concerning whether they had signed a union card until March 20, 1974, when Santoro told President Smith that all of the mechanics wanted a union and on March 22, 1974, when Santoro told Vice President Adams in effect that "everybody" signed the cards down in the union hall.[15]

On March 13 or 15, 1974, in order to assure Union Official Millet of Adams' willingness to recognize the Union if it had majority status, Gentile telephoned Adams and asked him to confirm such position for Millet, who was listening on an extension telephone. Adams confirmed his earlier statement.

Thereafter, on March 16, 1974, the six employed mechanics in the appropriate collective-bargaining unit signed new union authorization cards which were erroneously dated as of March 15, 1974.

The facts are clear that the Union (Local 170) became the designated majority representative of the employees in the mechanics' bargaining unit on March 16, 1974. On March 20, 1974, Union Representatives Gentile and Millet went to Respondents' offices, met with Vice President Adams, and presented a letter dated March 18, 1974, wherein appropriate demand was made for bargaining with Respondent Smith concerning the mechanics' unit. During this meeting President Smith also appeared and participated. It is sufficient to say that at this meeting the parties discussed other pending contract negotiations and recognition concerning the mechanics' unit.

[15] Later in April, 1974, employee Castonguay in effect told President Smith that a majority of the employees in the mechanics unit supported the Union when he told President Smith that the Company did not have the "votes."

As indicated, Gentile presented to Adams the March 18, 1974, letter demand for recognition and bargaining. Gentile also took out of his pockets the union authorization cards signed by the employees. At this point, Adams told Gentile that he knew that he had the cards.[16] Millet questioned Smith as to whether the Respondent would recognize the Union as representative for the mechanics unit. Smith told Millet that he wanted an election and would talk to his attorney. Millet argued to Smith that Adams had stated he would recognize the Union if the Union had a majority,[17] that the Union wanted recognition and not an election because Adams had indicated such recognition. Smith told Millet that he would check with his lawyer and get back to him. Millet told Smith that the Respondents should contact Gentile concerning the matter.[18]

On March 20, 1974, Santoro, one of the mechanics, had a conversation with President Smith wherein Santoro told President Smith in effect that all of the mechanics wanted the Union. Later on March 22, 1974, Santoro told Vice President Adams that all of the mechanics had signed union cards.

[16] Gentile's testimony on this point was somewhat conclusionary. I do not credit his testimony to the effect that Adams said he had talked to all of the employees. I am persuaded that such testimony is Gentile's conclusion as to the total effect as to what was said.

[17] I do not credit Adams' testimony to the effect that he questioned the Union's majority. Nor do I credit Smith's testimony to the effect that Millet indicated that the Union wanted an election.

[18] I do not credit Adams' testimony to the effect that Millet threw a contract concerning the mechanics at him and that he returned it at this meeting. Rather, I am persuaded as testified to in composite effect by Millet and Gentile that such proposal was given the Respondent on or about March 22, 1974.

On March 22, 1974, the Respondents signed a contract concerning the Buckley wholesale drivers unit. On March 22, 1974, Gentile left a copy of a proposed contract for the Smith mechanics unit with the Respondents.

Either on March 22 or a day or two afterwards, Adams telephoned Gentile and told him in effect that the Respondent recognized the Union as exclusive collective-bargaining agent for the Smith mechanics unit.

On March 26, 1974, Union Representatives Millet and Gentile met with Vice President Adams at Respondents' offices. At this meeting Adams told the union representatives that he had only received the (mechanics) contract on March 22 and had not had time to study it, that he was going away for 10 days, that he would take the contract with him and study it, and that he would call the Union when he got back and set up a meeting. Millet told Adams that the contract as proposed was negotiable. At this meeting Gentile and Adams also discussed negotiations concerning the Smith retail drivers contract.

On April 12, 1974, Gentile and Millet again met with Vice President Adams at Respondents' offices. At this meeting Vice President Adams stated that he saw nothing wrong with the language in the proposed contract for the mechanics unit. Adams told Millet and Gentile, however, that the wages were way off. The parties then proceeded to negotiate concerning wage items. During the negotiations Adams indicated that the unfair labor practice charge filed concerning Dolson's discharge was a deterrent to continued negotiations. Millet indicated to Adams that he would talk to Dolson about withdrawal of such charges.

On April 12, 1974, Gentile and Adams also engaged in some negotiations concerning the Smith retail drivers unit contract. There is a conflict between the testimony of Gentile and the testimony of Adams as to whether an agree-

ment was reached as to the terms of a Smith retail drivers unit contract. As indicated, there are good and bad points concerning the credibility of both Gentile and Adams. Gentile's testimony as to the negotiations concerning the retail drivers unit contract was not precise or detailed. Considering both witnesses' testimony, the lack of persuasiveness of Gentile's testimony as he testified to the details of the retail drivers unit contract negotiations, and the logical consistency of all of the evidence, I credit Adams' testimonial denial that agreement was reached on April 12, 1974, as regards a Smith retail drivers unit contract. I discredit Gentile's testimony to the effect that agreement was reached on April 12, 1974, on a Smith retail drivers unit contract.

On April 18, 1974, the unfair labor practice charge concerning Dolson's discharge was withdrawn. On April 18, 1974, Gentile, for the Union, submitted a complete contract proposal to the Respondent concerning the Smith retail drivers unit. This proposal contained certain clauses including a "stand-by" clause and a "protection of rights" clause. Such provisions had not been agreed to by the parties.

On April 22, 1974, as previously indicated, President Smith and Messina met with the mechanics. At such meeting Messina spoke to the employees about the pros and cons for employee consideration as to whether they wanted a union.

On April 23, 1974, Union Representative Gentile met with Vice President Adams at Respondents' offices. At this meeting Adams told Gentile that no agreement could be reached on wages for the mechanics unit, that the Respondents were going to get a lawyer and cease bargaining. Gentile protested that Adams had already recognized the Union and was already in bargaining. Adams told Gentile

that he should do what he had to do, that the Respondents were going to do what they had to do. It is clear that since that date the Respondents have refused to bargain with the Union as to the employees in said Union.[19]

Considering all of the foregoing, I conclude and find that the Respondents, by Respondent Smith, engaged in conduct violative of Section 8(a)(5) and (1) of the Act by withdrawing recognition from the recognized exclusive collective-bargaining representative of the employees in Smith's "mechanics" unit, and by refusing to bargain thereafter with the Union as regards such unit of employees.

I. *Alleged Refusal to Bargain*

Alleged Refusal to Sign Agreed Upon Contract — Smith's Retail Drivers Unit

The General Counsel alleges and the Respondent denies that since on or about April 26, 1974, and continuing to date, Respondent Smith has refused to execute a written collective-bargaining agreement concerning the employees in the unit described in Section III B 2 above, which agreement was concluded on April 12, 1974.

The pertinent facts as to whether the Respondent agreed with the Union over the terms of a retail drivers unit contract on April 12, 1974, have already been set forth in Section III H above. It has been found that agreement to the terms of a contract for the retail drivers was not reached on April 12, 1974. As set out in Section III H

[19] The Respondents on April 25, 1974, filed a representation petition in Case 1-RM-902 concerning the Smith "mechanics" unit. I also credit Smith's testimony to the effect that Millet, for the Union, telephoned him and threatened to strike because Respondents would not negotiate concerning the "mechanics."

above, the Union on April 18, 1974, submitted a full proposal for a retail drivers unit contract to the Respondent. Again, as set forth in Section III H above, the Respondent withdrew its previously accorded recognition to the Union as bargaining agent for the Smith "mechanics" unit. Thereafter, as set forth in more detail later, the three units of Respondents' employees, the Smith "mechanics" unit, the Smith "retail drivers" unit, and the Buckley "wholesale drivers" unit commenced a strike against the Respondents on April 29, 1974.

After the aforesaid strike started and the retail drivers unit employees had already participated in said strike, Gentile telephoned Vice President Adams and asked him if he was going to sign the "retail drivers" agreement. Adams told Gentile that he was not.[20]

Considering the foregoing and all of the facts, I conclude and find that the facts do not reveal that the Respondents, by Respondent Smith, have violated Section 8(a)(5) and (1) of the Act by refusing to sign an agreed upon contract on or about April 26, 1974. It will be recommended that allegations in such regard be dismissed.[21]

[20] Considering the totality of all of the evidence, I do not credit Gentile's testimony to the effect that Adams stated that he had changed his mind.

[21] Although the parties litigated whether or not either the Union or the Respondents had made statements in post charge "negotiations" or settlement attempts of an "admission" nature shedding light upon whether there had been or had not been agreements reached or recognition accorded, the evidence reveals no "admissions" by either party in such post charge "negotiations" or settlement attempts.

J. *The Unfair Labor Practice Strike*

The Discriminatory Refusal to Reinstate Unfair Labor Practice Strikers

The facts and contentions relating to the unfair labor practice strike and discriminatory refusal to reinstate unfair labor practice strikers may be summarized as follows:

1. The General Counsel alleges and the Respondents admit that — on or about April 29, 1974, the employees in the bargaining units described in Section III B 2 herein (Respondent Smith's retail drivers unit), Section III B 3 herein (Respondent Buckley's wholesale drivers unit), and Section III B 4 herein (Respondent Smith's mechanics unit), ceased work concertedly and went out on strike. The parties further stipulated that the strike ran from April 29, 1974, through July 8, 1974.

2. Considering the pleadings and admission therein, stipulations, and facts otherwise presented, the facts reveal that (a) the entire complement of Respondent Smith's mechanics unit, consisting of employees Flagg, Castonguay, Morrison, Santoro, Luby, and Desy, participated in the referred to strike from April 29, 1974, through July 8, 1974; (b) two of Respondent Smith's three employees in Respondent Smith's retail drivers unit, to wit, employees Wilson and Wadowski, participated in the referred to strike from April 29, 1974, through July 8, 1974; and (c) the entire complement of Respondent Buckley's wholesale drivers unit, consisting of employees on the active payroll and on layoff status, participated in the strike referred to above from April 29, 1974, through July 8, 1974.[11]

[11] The pleadings and admissions were to the effect that employees, without a qualification as to the employees in number or category, in the specifically referred to bargaining units, went out on strike on April 29, 1974. Absent evidence to a contrary effect, as in the case of retail driver Hazzard, the pleadings establish and the litigation reveals that there is no issue as to whether all of the other employees were on strike during the time April 29, 1974, through July 8, 1974.

Thus, in addition to the specific mechanic employees referred to above, and the specific retail drivers referred to above, Respondent Buckley's wholesale driver employees who were on strike from April 29, 1974, through July 8, 1974, were Edward Butler, John Booth, Clyde Whitaker, William LaRose, David Plante, Joseph Luksha, E. William Bedard, William McIntosh, and Thomas Crilly, all of the foregoing being employees on the active payroll of Respondent Buckley, and employees Richard Erickson, Paul Menard, David Bedard, Arthur Lewis, Stanley MacDonald, Bruce Hathaway, Richard Cook, Robert Giordani, William Paige, Edward Commo, and Thaddeus Mroczhowski, who were on layoff status for Respondent Buckley.

3. (a) The General Counsel alleges and the Respondents deny that the strike which occurred from April 29, 1974, through July 8, 1974, was caused by certain of Respondents' unfair labor practices.

(b) The facts previously found reveal that (1) Respondents have violated Section 8(a)(1) of the Act by the conduct of Vice President Adams in interrogating employees in Respondent Smith's mechanics unit on March 11 or 13, 1974; (2) that Respondents violated Section 8(a)(5) and (1) of the Act by bargaining directly with individual employees in Respondent Smith's retail drivers unit instead of with the exclusive collective-bargaining representative concerning wages and working conditions of unit employees; and (3) that Respondents violated Section 8(a)(5) and (1) of the Act by withdrawing recognition from the Union as exclusive collective-bargaining agent for Respondent Smith's em-

ployees in the mechanics unit, and for refusing to bargain with said Union as to such unit. These unfair labor practices were part of the unfair labor practices contended to be a cause of the strike on April 29, 1974, through July 8, 1974. Another alleged unfair labor practice, alleged refusal to sign an agreed upon contract concerning the Smith retail drivers unit, has been found to be without merit.

(c) In addition to the foregoing facts, the facts are clear that the Union held a meeting with employee members of Respondent Smith's mechanics unit, that at such meeting Union Representative Gentile reported that Respondent Smith was refusing to negotiate with the Union concerning such mechanics unit, and the employees (mechanics) voted to strike.

The pleadings and the evidence otherwise reveal that the strike by the mechanics commenced on April 29 and that two of the employees in Respondent Smith's retail drivers unit (Wilson and Wadowski) and the employees in Respondent Buckley's wholesale drivers unit joined in said strike on April 29, 1974.

As to the motivation of Smith's retail drivers unit employees concerning the strike (April 29, 1974 — July 8, 1974), Union Representative Gentile testified to the effect that he was told on or around April 30, 1974, by Vice President Adams that he had changed his mind about signing an agreed upon contract concerning the "retail drivers" and that the strike by the "retail drivers" was caused by such unfair labor practices by the Respondents. Wilson, a retail driver employee, testified credibly that Gentile told the retail drivers that Respondents wouldn't sign a "retail driver" contract as long as there was trouble with the mechanics. As indicated in the facts previously found, I do not find that Respondents violated Section 8(a)(5) and (1) of

the Act by refusing to sign an agreed upon collective-bargaining agreement covering the "retail drivers" since I do not find that such contract had been agreed upon.

In sum, the facts reveal that the "retail drivers" struck in support of the "mechanics" who were engaged in an unfair labor practice strike and because of a belief that the Respondents would not negotiate as to the "retail drivers" contract as long as there was trouble with the mechanics.

The only evidence, other than the facts previously set forth, relating to the motivation for the striking activities of the Buckley wholesale drivers on April 29, 1974, through July 8, 1974, consists of the Union's filing of an unfair labor practice charge contending that such employees were "locked out," Gentile's testimonial denial in effect that such employees were "striking," and Gentile's testimony to the effect that such employees in effect honored the picket line.[33]

In sum, the evidence, excluding the question of whether the "wholesale drivers" right to strike was affected by contract provisions concerning a "no-strike" clause, or by a State Court proceeding, reveals that the "wholesale drivers" struck in sympathy with the "mechanics" unit employees in an unfair labor practice strike.

(d) The Respondents contend in effect that Respondent Buckley's wholesale drivers are not entitled to have the status of unfair labor practice strikers because they struck in violation of a "no strike" clause in the existing contract, and because certain agreements were made by the Union in a State Court proceeding relating to such employees refraining from picketing. The Respondents, at the trial or prior thereto, contended also that Respondent Smith's retail

[33] The Charging Party's brief asserts in effect that the "wholesale" drivers were engaged in a sympathy strike.

drivers did not have protected status because they struck at a time when the Union had not sent or filed a notice of termination or reopening as to the last collective-bargaining contract, and that therefore such contract was still in existence and proper notice had not been given prior to striking activity.

(e) As to the Respondents' contention concerning the "no strike" clause in the existing contract covering the Buckley wholesale drivers, the following provisions in such contract are hereby excerpted:

ARTICLE V
GRIEVANCE PROCEDURE

Item 1. A grievance is hereby jointly defined to be any controversy, complaint, misunderstanding, or dispute.

Any grievance arising between the Company and the Union or an employee represented by the Union shall be settled in the following manner:

Step 1. The aggrieved employee or employees, must present the grievance to the Shop Steward within five (5) working days after the reason for the grievance has occurred, except no time limit shall apply in case of violation of wage provisions of this Agreement. If a satisfactory settlement is not effected with the foreman within three (3) working days, the Shop Steward and Employee shall submit such grievance in writing to the Union's Business Representative or Secretary-Treasurer.

Step 2. The Business Representative or Secretary-Treasurer shall take the matter up with a representative

of the Company with authority to act upon such grievance. A decision must be made within five (5) working days.

Item 2. If no satisfactory settlement can be agreed upon, the parties shall select a mutually agreeable and impartial arbitrator within three (3) days after disagreement. In the event they are unable to so agree, the matter shall be referred to the American Arbitration Association the next day. After the Service submits a list of arbitrators to the Union and the Company, they shall reply with their preferred selections no later than three (3) days after receipt of such list. The expense of the Arbitrator selected or appointed shall be borne equally by the Company and the Union.

Item 3. The Arbitrator shall not have the authority to amend or modify this Agreement or establish new terms or conditions under this Agreement. The Arbitrator shall determine any question of arbitrability. In the event the position of the Union is sustained the aggrieved party shall be entitled to all the benefits of this Agreement which would have accrued to him had there been no grievance.

Item 4. Both parties agree to accept the decision of the Arbitrator as final and binding. If the Company fails to comply with the award of the Arbitrator or with the procedures of this Article, the Union has a right to take all legal and economic action to enforce compliance.

Item 5. There shall be no strike, work stoppage or interruption of work during the term of this Agreement unless the Company shall refuse to comply with an arbitration award pursuant to arbitration proceedings instituted in accordance with the terms of this Article. There shall be no lockout during the term of this

> Agreement unless the Union or the employees refuse to comply with an arbitration award pursuant to arbitration proceedings instituted in accordance with the terms of this Article.

In addition to the foregoing, much testimony was elicited from witnesses for the purpose of providing background meaning for such contractual no-strike clause.

In my opinion, the Board's decision in the Gary-Hobart Water Corporation Case, 210 NLRB 742, 745, enforced by the U.S. Court of Appeals, Seventh Circuit, on February 21, 1975 (88 LRRM 2830) is controlling and requires a rejection of Respondents' contention. The facts in the instant case and in the Gary-Hobart case as to the language of the arbitration-no-strike clauses are essentially similar.

In the Gary-Hobart case, the Board said, "And at least where statutory rights are involved, unless they are specifically waived, the contracting union does have the right to strike in connection with a dispute not subject to grievance-arbitration, for the no-strike clause is only as extensive as the grievance-arbitration procedure."

The Court (the U.S. Court of Appeals, Seventh Circuit) found the contractual language in the Gary-Hobart case not to constitute clear and unmistakeable language waiving the right to strike beyond the areas of dispute covered by the grievance and arbitration procedure. The Court further found that because of the language involved in such clauses that the bargaining history concerning such clauses need not be examined, that, however, an examination of such history reinforced their view as to the construction of such clauses.

Considering all of the foregoing, I conclude and find that the contractual language in the Union-Buckley contract does not reveal a waiver of the right to strike over unfair labor

practices or to strike in sympathy with other employees. I do not find it necessary to examine the bargaining history related to such clauses in order to determine meaning thereof. In this regard, I note that the contract, in addition to the clauses set out above, does not contain clauses which are contradictory of the pertinent clauses. Also, I would note that if the bargaining history of such clause were relevant, I would not find such evidence in this case to be sufficient to reveal that the Union had contractually waived its right to strike over unfair labor practices or to engage in sympathy strikes.

Reasonably construed, the initial definition of grievance in broad terms is narrowed by the other paragraphs relating to the procedure and settlement of grievances. It is clear that the employees covered by the agreement are not the aggrieved employees as regards the disputes between the "retail drivers" and "mechanics" and the Respondents. Thus, the "wholesale drivers" had no standing under the contract to file a viable grievance concerning their right to be sympathy or unfair labor practice strikers or over the underlying disputes between the Respondents and the "mechanics" and "retail drivers."[14]

(f) As to Respondents' contention relating to alleged affect of union agreements with respect to a State court proceeding as having a bearing on the Buckley wholesale drivers right to strike, I excerpt the following from the "Stipulations in lieu of Restraining Order":

> Now come all the parties in the above entitled matter and say that there is presently pending before

[14] I have considered the numerous cases cited by the parties. I reject Respondents' contention that the clause in the contract involved herein has the effect of a properly worded "zipper clause," and therefore that the principles of *Radioear Corporation*, 214 NLRB No. 33, has application to the issue involved herein.

the Worcester Superior Court a hearing in accordance with M.G.L. Ch. 212 § 30 and, in accordance therewith and without waiving any rights or defenses in any other actions which might arise out of the said controversy which is the subject matter of the Bill in Equity being Worcester Superior Court #6700 involving the above named parties, it is stipulated between the said parties as follows:

. . . . . .

5. Those members of the wholesale drivers employed by Petitioners agree not to participate or engage in picketing of Petitioners' premises at 99 Crescent Street, Worcester, Massachusetts, or at 386 Southbridge Street, Auburn, Massachusetts, during the pendency of the present strike involving the "Mechanics" employed by Petitioners.

I reject Respondents' contentions that said stipulations affected the Buckley wholesale drivers' right to engage in sympathy or unfair labor practice strikes. Thus, the stipulations in and of themselves provide that the parties are not *waiving* any rights or defenses in any other actions. The question involved herein is one of statutory rights under the National Labor Relations Act and comes within the province of the Board and not State courts. It would not effectuate the policy of the National Labor Relations Act to accord to State courts the right to prohibit lawful activities permitted by the Act.

(g) As to Respondents' contention prior to the trial that the Smith Retail drivers struck unlawfully because "notice" had not been filed concerning termination or reopening of the last negotiated contract, it appears that the Respondents

abandoned such contention. If not, I reject such contention. It is clear that a "notice" to terminate or reopen a contract is not a prerequisite for striking activity concerning unfair labor practices or a sympathy strike. Further, no evidence was adduced to support such contention.

Conclusion

(h) Considering all of the foregoing, I am persuaded and conclude that the strike that occurred on April 29, through July 8, 1974, was an unfair labor practice strike. Thus, I am persuaded that the strike was caused in major part by Respondents' unfair labor practices of unlawful withdrawal of recognition from the Union as the exclusive collective-bargaining agent for the employees in Respondent Smith's mechanics unit. I am persuaded that Respondents' unfair labor practice of unlawful interrogation of employees in the mechanics unit also contributed to the causation of the strike. Thus, I am persuaded that the strike commenced as an unfair labor practice strike by the mechanic employees of Respondent Smith. The overall facts persuade that the retail driver employees of Respondent Smith who struck, Wilson and Wadowski, and the wholesale driver employees of Buckley engaged in the strike primarily in sympathy with the strike of the mechanic employees. Such employees of the same enterprise, who struck in sympathy with the mechanics, acquired the same status as the mechanics as being unfair labor practice strikers.[25] Further I am convinced that Respondents' unfair labor practices of bargaining directly with individual retail drivers instead of with the Union contributed in part to the causation of the strike as regards the Smith retail drivers.

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[25] *Morrison-Knudsen Co.*, 210 NLRB 174, 177, footnote 2; *Gary-Hobart Water Corporation*, 210 NLRB 742.

In sum, I am persuaded that the Union and the involved employees struck the Respondents primarily because of Respondents' unfair labor practices in withdrawal of recognition from the Union as to the Smith's mechanics unit and in refusing to bargain with the Union as to such unit. It is clear, as indicated, that all of the striking employees enjoyed the status of unfair labor practice strikers entitled to reinstatement upon their unconditional offer to return to work.

4. The pleadings and admissions therein and the overall facts establish that — on or about July 8, 1974, the employees of the Respondents in the Smith retail drivers unit, in the Smith mechanics unit, and in Buckley's wholesale drivers unit, previously set forth in detail in Section III B 2, 3, and 4, who had engaged in the strike on April 29, through July 8, 1974, made an unconditional offer to return to their former or substantially equivalent positions of employment.

The General Counsel alleges and the Respondent admits that since on or about July 9, 1974, Respondents have failed or refused and continue to fail or refuse to reinstate certain employees in the units of employees involved in this proceeding.

The facts reveal that the Respondents have not reinstated or recalled employees Whitaker, Plante,[25] Luksha, William Bedard, McIntosh, Crilly, Erickson, David Bedard, Arthur Lewis, MacDonald, Hathaway, Cook, or Commo, all employees in the Buckley wholesale drivers unit. The facts

[25] The parties stipulated to the effect that Plante was among the employees who had not been recalled to work. An earlier confused stipulation was to the effect that Plante had been offered reinstatement and had refused such offer. Under the circumstances, I must give controlling weight to the later written stipulation submitted by the parties after I had pointed out the possible confusion in their earlier stipulation.

also reveal that the Respondents have not reinstated or recalled employee Wadowski, an employee in the Smith retail drivers unit. The facts further reveal that the Respondents have not reinstated or recalled employees Flagg, Castonguay, Morrison, Santoro, Luby, and Desy, employees in the Smith mechanics unit.

The facts reveal as regards the other employees that employee William Paige, in the Buckley wholesale drivers unit, was rehired in December of 1974, and that employee Harry Wilson was recalled on October 15, 1974.

The precise dates of recall are not revealed, but the parties' stipulations reveal that employees Butler, Booth, LaRose, Menard, Giordani and Mroczhowski have been recalled to work in the Buckley wholesale drivers unit.

The critical issues in this case touch the question of unfair labor practice strikers and their right to reinstatement.

Considering all of the evidence and facts as set forth before or herein, I conclude and find that the employees referred to above as not having been recalled or reinstated to work, or as having been recalled or rehired in December, 1974, or on October 15, 1974, were unfair labor practice strikers, entitled to reinstatement upon the July 8, 1974, unconditional offer to return to work, were entitled to be promptly reinstated to their old jobs, and that the failure of the Respondent on July 9, 1974, and thereafter to promptly reinstate such unfair labor practice strikers to their old jobs constituted discrimination within the meaning of Section 8(a)(3) and (1) of the Act. It is so concluded and found.

In making the foregoing conclusions and findings, I have considered the following and made conclusions as indicated. The Respondents presented evidence that 12 permanent replacements for the Buckley wholesale drivers were hired at the beginning of the April 29, 1974, through July 8,

1974, strike. The Respondents presented evidence to the effect that the replacements were required as a matter of economic necessity. I note that as a general principle, unfair labor practice strikers do not lose their right to reinstatement because the Respondents have hired replacements. The instant strike was a "total" strike by the unfair labor practice strikers and not a "partial" strike wherein the strikers were working but only striking at a place of delivery of goods or the crossing of a picket line at other premises. The restricted and qualified right of permanent replacement afforded an employer in the "partial" strike situation is not afforded the employer in a "total" strike situation. I reject Respondents' contentions that the unfair labor practice strikers had been replaced and therefore were not entitled to their jobs back.[37]

The Respondents contend that employees William Bedard and William McIntosh engaged in strike misconduct involving an assault on employee Roger Witt, and that such employees are not entitled to reinstatement because of such misconduct. The facts as to such misconduct was presented by the testimony of Witt and was denied in effect by the testimony of Bedard, McIntosh, and Paige. It is sufficient to say that I found Witt the most credible of all witnesses on such issue, credit his version of the facts and, because of an assault by McIntosh on Witt, and the circumstances of Bedard's accompaniment of McIntosh, conclude that Bedard and McIntosh are not entitled to the remedial order of reinstatement and backpay found otherwise in this case.

The Respondents contend that employee Wadowski resigned his employment and therefore was not entitled to reinstatement or to backpay. The facts are clear that the Respondents did not reinstate Wadowski to his former job as a retail driver after July 8, 1974, when an unconditional

[37] Cf. *Redwing Carriers, Inc.*, 137 NLRB 1545.

offer for reinstatement was made on his behalf. Later Wadowski found it necessary in order to secure other employment to "resign" from the Respondents and did so. The timing of Respondents' discrimination against Wadowski commenced on or around July 9, 1974, when Respondents did not promptly reinstate Wadowski upon his unconditional offer to return to work. At that time he became the same as a discriminatorily discharged employee within the meaning of Section 8(a)(3) of the Act. Under these circumstances, Wadowski's resignation was similar to a constructive discharge and does not reveal a voluntary relinquishment of his right to be reinstated and to be made whole for loss of wages following Respondents' refusal to promptly reinstate him on or around July 9, 1974.

The Respondents contend that the Smith unit of mechanic employees did not exist after July 8, 1974, and therefore that there were no positions for reinstatement of employees who were striking mechanics. During the trial the General Counsel introduced evidence concerning subcontracting prior to the April 29, 1974, strike, as background to reveal the "existence" of mechanics work after the completion of the strike. It is sufficient to say that the totality of the evidence relating to "subcontracting" is not sufficient to reveal that such "subcontracting" as occurred before the strike was for an unlawful purpose. Thus, such evidence is not beneficial in determining whether or not "mechanics" work existed after the strike. However, the General Counsel's witnesses did testify credibly to the effect that "mechanical" work was being performed at the Respondents' premises after the strike. The Respondents essentially offered no evidence to support their contention that no mechanical work was being performed after the strike. Considering all of the foregoing, I conclude and find the facts establish that Respondents have not ceased mechanical work and that whether the unfair labor practice

strikers were replaced by other employees or other means such as subcontracting, the Respondents had an obligation to reinstate the unfair labor practice strikers, firing replacements if necessary or ceasing subcontracting or such other means of "replacements," if necessary.

In sum, I have concluded and found that the employees in the Smith retail drivers unit, in the Smith mechanics unit, and in the Buckley wholesale drivers unit, who had unconditionally offered to return to work and whom (the facts reveal) the Respondents did not promptly reinstate to their former jobs, to be employees discriminated against by such refusal to reinstate within the meaning of Section 8(a)(3) and (1) of the Act. As to all said employees, except William Bedard and William McIntosh because of their misconduct during the strike, the remedial order will require reinstatement and "make whole" backpay provisions for failure of timely reinstatement by the Respondents.

5. I note that employees Butler, Booth, LaRose, Menard, Giordani, and Mroczhowski were recalled to work after the strike. These employees may or may not have been promptly reinstated after the July 9, 1974, unconditional offer to return to work. The instant case does not involve the situation of an ongoing unfair labor practice strike at the time of litigation wherein orders are utilized requiring Respondents to reinstate striking employees upon unconditional offers to return to work and to make employees whole for loss of backpay if timely reinstatement is not made. Such orders are issued as a remedy for the effects of the underlying unfair labor practices causing said strike. In the instant case the unfair labor practice strikers have made unconditional offer to return to work. Whether such employees are discriminatees, within the meaning of Section

8(a)(3) of the Act, depends upon whether the Respondents reinstated or did not reinstate such employees in a timely fashion.

It is General Counsel's burden to establish whether the employees who were unfair labor practice strikers in this case are discriminatees or not. If he proves that such unfair labor practice strikers have made unconditional offer to return to work and have not been reinstated or have not been timely reinstated, he has met his burden. If he does not establish the foregoing, the General Counsel has failed to meet his burden of proof. As to Butler, Booth, LaRose, Menard, Giordani, and Mroczhowski, the General Counsel has not established that the Respondents failed to timely reinstate such employees to their former jobs.[28] Accordingly, it is concluded and found that the General Counsel has failed to establish that the Respondent has discriminated, within the meaning of Section 8(a)(3) of the Act, by the refusal to recall or reinstate Butler, Booth, LaRose, Menard, Giordani, and Mroczhowski to work.

6. To the extent that the General Counsel's pleadings appear to raise issues of discrimination against certain individuals above and beyond the question of "rights of unfair labor practice strikers," and that the reinstatement of some of the strikers was in derogation of rights of other strikers, I find the evidence to be insufficient to establish such points.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of the Respondent set forth in section III, above, occurring in connection with the Respondents'

[28] The General Counsel's presentation of his case and argument leaves it unclear as to whether he contends these employees to be discriminatees. In any event, his proof fails to establish that they are discriminatees.

operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

Upon the basis of the above findings of fact and upon the entire record in the case, I make the following:

V. Conclusions of Law

1. C.K. Smith & Co., Inc., and Buckley Heating Co., Inc. (Gasoline Division), the Respondents, constitute an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Teamsters Local 170, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

3. By withdrawing recognition from the Union (Teamsters Local 170) as exclusive collective-bargaining representative of the employees in Respondent Smith's mechanics unit and refusing to collectively bargain with said Union concerning such employees' wages, hours, and working conditions, Respondents have violated Section 8(a)(5) and (1) of the Act.

4. By bargaining directly with individual employees in Respondent Smith's retail drivers unit and thereby bypassing and attempting to bypass bargaining with the Union (Teamsters Local 170), Respondents have violated Section 8(a)(5) and (1) of the Act.

5. The strike of employees against the Respondents, occurring on April 29, 1974, through July 8, 1974, was an unfair labor practice strike caused by unfair labor practices of the Respondents.

6. By refusing to recall to work or reinstate, on July 9, 1974, and thereafter, or to timely do so, certain employees, who had been unfair labor practice strikers against the Respondents, upon their unconditional offer on July 8, 1974, to return to work, Respondents have violated Section 8(a)(3) and (1) of the Act.

7(a) All retail truckdrivers of Respondent Smith employed at its Worcester plant, exclusive of all supervisors as defined in Section 2(11) of the Act, constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act. This unit has been and is referred to sometimes herein as Respondent Smith or Smith's retail drivers unit.

(b) All mechanics and warehousemen of Respondent Smith employed at its Worcester plant, exclusive of all other employees and all supervisors as defined in Section 2(11) of the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act. This unit has been and is referred to sometimes herein as Respondent Smith or Smith's mechanics unit.

(c) All drivers, warehouse employees and helpers of Respondent Buckley employed at its Worcester plant, exclusive of all other employees and all supervisors as defined in Section 2(11) of the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act. This unit has been and is sometimes referred to herein as Respondent Buckley or Buckley's wholesale drivers unit.

(d) Teamsters Local 170, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is the representative for the purposes of collective bargaining of a majority of all of the employees in each of the respective bargaining units referred to above, and has been, at all times material to this proceeding, and is now

the exclusive representative of all of the employees in each respective unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment.

8. By the foregoing and by interfering with, restraining, and coercing its employees in the exercise of rights guaranteed in Section 7 of the Act, Respondents engaged in unfair labor practices proscribed by Section 8(a)(1) of the Act.

9. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

VI. The Remedy

Having found that the Respondents have engaged in unfair labor practices, it will be recommended that Respondents cease and desist therefrom and take certain affirmative action to effectuate the policies of the Act.

Having found that the Respondents have violated Section 8(a)(5) and (1) of the Act by bargaining directly with employees in Respondent Smith's retail drivers unit and thereby bypassing the exclusive collective-bargaining representative of such employees, it will be recommended that Respondents be required to cease and desist from such action and to bargain collectively, upon request, with the exclusive collective-bargaining representative of such employees.

Having found that the Respondents have violated Section 8(a)(5) and (1) of the Act by withdrawal of recognition from the Union as exclusive collective-bargaining representative of employees in Respondent Smith's mechanics unit, it will be recommended that Respondents be required to recognize said Union (Teamsters Local 170) as the exclusive collective-bargaining representative of employees in said mechanics unit and to bargain collectively, upon request, with said Union.

Having found that the Respondents have violated Section 8(a)(3) and (1) of the Act by refusal to recall to work or reinstate in a timely fashion certain employees who had been engaged in an unfair labor practice strike against the Respondents, it will be recommended that the Respondents be required to offer each such employee reinstatement to his former job, and make each employee whole for loss of earnings resulting from Respondents' failure on July 9, 1974, and thereafter, to promptly and timely offer such employee recall to work or reinstatement to his job after the July 9, 1974, unconditional offer to return to work, such loss of earnings computed within the meaning and in accord with the Board's decisions in *F.W. Woolworth Company*, 90 NLRB 289; *Isis Plumbing & Heating Co.*, 138 NLRB 716, except as specifically modified by the wording of such recommended order.

The employees covered by the above mentioned offer of reinstatement and backpay include employees Clyde Whitaker, David Plante, Joseph Luksha, Thomas Crilly, Richard Erickson, David Bedard, Arthur Lewis, Stanley MacDonald, Bruce Hathaway, Richard Cook, Edward Commo, James Wadowski, Raymond Flagg, Richard Castonguay, Sr., Douglas C. Morrison, Gregorio Santoro, Robert Luby, and Raymond Desy. Included also in the above referred to group of employees are employees Harry Wilson, returned to work on October 15, 1974, and William Paige, rehired in December of 1974. The regular and customary remedial order of reinstatement for Wilson and Paige will be utilized to insure that such employees are fully reinstated without loss of any benefits, seniority or otherwise, previously enjoyed. To the extent that Respondents' return to work of Paige and Wilson satisfies the remedial order, the Respondents will be required in the compliance stage of this pro-

ceeding to take only such steps as may be necessary to fully comply with the remedial order.

Because of the character of the unfair labor practices herein found, the recommended Order will provide that the Respondents cease and desist from in any other manner interfering with, restraining, and coercing employees in the exercise of their rights guaranteed by Section 7 of the Act.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[29]

ORDER

Respondents, C.K. Smith & Co., Inc., and Buckley Heating Co., Inc. (Gasoline Division), their officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Coercively interrogating employees concerning their union membership, activities or desires.

(b) Promising employees adjustments in working conditions to dissuade their support of a union.

(c) Threatening employees with loss of work opportunity to dissuade their support of a union.

(d) Withdrawing recognition and refusing to bargain collectively with the Union with respect to rates of pay, hours, and other conditions of employment of Respondent Smith's employees in the appropriate bargaining unit of mechanics set out below.

[29] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(e) Bargaining directly with individual retail driver employees of Respondent Smith in derogation of their collective-bargaining representative for the appropriate retail drivers bargaining unit of employees set out below.

(f) Discouraging membership in, or activities on behalf of Teamsters Local 170 or any other labor organization, or the engaging in protected concerted activities, by refusing to reinstate unfair labor practice strikers upon their unconditional offer to return to work.

(g) In any other manner interfering with, restraining or coercing its employees in the exercise of their rights guaranteed by Section 7 of the Act, except to the extent that such rights are affected by the provisions of Section 8(a)(3) of the Act.

2. Take the following affirmative action which it is found will effectuate the policies of the Act:

(a) Recognize the Teamsters Local 170, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the exclusive collective-bargaining representative of employees in Respondent Smith's mechanics unit set out below.

(b) Bargain collectively upon request with Teamsters Local 170, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the exclusive collective-bargaining representative of employees in the appropriate bargaining units set out below, and embody any understanding reached in a signed agreement.

The appropriate bargaining unit of Respondent Smith employees, referred to above as Respondent Smith's mechanics unit is as follows:

All mechanics and warehousemen of Respondent Smith employed at its Worcester plant, exclusive of all other

employees and all supervisors as defined in Section 2(11) of the Act.

The appropriate bargaining unit of Respondent Smith employees, referred to above as Respondent Smith's retail drivers unit is as follows:

All retail truck drivers of Respondent Smith employed at its Worcester plant, exclusive of all other employees and all supervisors as defined in Section 2(11) of the Act.

(c) Offer immediate and full reinstatement to the employees listed below to their former positions, or if such positions no longer exist, to substantially equivalent positions without prejudice to their seniority or other rights previously enjoyed, and make them whole for any loss of pay or other benefits suffered as a result of the refusal on July 9, 1974, and thereafter, to promptly reinstate such employees upon their unconditional offer to return to work on July 8, 1974, from an unfair labor practice strike engaged in by such employees. Such backpay and other benefits to be computed in accordance with the manner set forth in the section of this decision entitled "The Remedy."

Clyde Whitaker	William Paige
David Plante	Edward Commo
Joseph Luksha	Harry Wilson
Thomas Crilly	James Wadowski
Richard Erickson	Raymond Flagg
David Bedard	Richard Castonguay, Sr.
Arthur Lewis	Douglas C. Morrison
Stanley MacDonald	Gregorio Santoro
Bruce Hathaway	Robert Luby
Richard Cook	Raymond Desy

(d) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this recommended Order.

(e) Post at Respondents' place of business at Worcester, Massachusetts, copies of the attached notice marked "Appendix."[30] Copies of said notice, on forms provided by the Regional Director for Region 1, after being duly signed by Respondents' representatives, shall be posted by it immediately upon receipt thereof, and be maintained by Respondents for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondents to insure that said notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director for Region 1, in writing, within 20 days from the date of receipt of this Order, what steps the Respondents have taken to comply herewith.

It is further ordered that the allegations of unlawful conduct not specifically found to be violative herein be dismissed.

Dated, Washington, D.C.

JERRY B. STONE,
Administrative Law Judge

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[30] In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

Supreme Court, U. S.
FILED
MAY 24 1978
MICHAEL RODAK, JR., CLERK

No. 77-1374

In the Supreme Court of the United States

OCTOBER TERM, 1977

C. K. SMITH & CO., INC., ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statement	2
Argument	5
Conclusion	11

CITATIONS

Cases:

Buffalo Forge Co. v. *United Steelworkers of America*, AFL-CIO, 428 U.S. 397	9
Gary Hobart Water Corp. v. *National Labor Relations Board*, 511 F. 2d 284, certiorari denied, 423 U.S. 925	5
General Tire & Rubber Co. v. *National Labor Relations Board*, 451 F. 2d 257	6
Kellogg Company v. *National Labor Relations Board*, 457 F. 2d 519, certiorari denied, 409 U.S. 850	5-6
Marshall Field & Co. v. *National Labor Relations Board*, 318 U.S. 253	7
Mastro Plastics Corp. v. *National Labor Relations Board*, 350 U.S. 270	5, 10
National Labor Relations Board v. *Brown & Root, Inc.*, 203 F. 2d 139	7
National Labor Relations Board v. *Brown & Root, Inc.*, 99 N.L.R.B. 1031	7
National Labor Relations Board v. *International Van Lines*, 409 U.S. 48, reversing 448 F. 2d 905	7, 8

Cases—Continued

	Page
National Labor Relations Board v. *L. G. Everist, Inc.*, 334 F. 2d 312	7
National Labor Relations Board v. *Rockaway News Supply Co., Inc.*, 345 U.S. 71	9
National Labor Relations Board v. *Seven-Up Co.*, 344 U.S. 344	7
National Labor Relations Board v. *Southern Greyhound Lines, Inc.*, 426 F. 2d 1299 (C.A. 5)	6
National Labor Relations Board v. *Union Carbide Corporation*, 440 F. 2d 54, certiorari denied, 404 U.S. 826	6
Newspaper Production Co. v. *National Labor Relations Board*, 503 F. 2d 821	6
Pilot Freight Carriers, Inc., 224 N.L.R.B. 341	6
Teamsters, Chauffeurs & Helpers Local U. No. 79 v. *National Labor Relations Board*, 325 F. 2d 1011, certiorari denied, 377 U.S. 905	7
Winter Garden Citrus Products Coop. v. *National Labor Relations Board*, 238 F. 2d 128	10

Statute:

National Labor Relations Act, as amended, 61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*:	
Section 7, 29 U.S.C. 157	6
Section 8(a), 29 U.S.C. 158(a)	3
Section 8(a)(1), 29 U.S.C. 158(a)(1)	3, 4

Statute—Continued

	Page
Section 8(a)(3), 29 U.S.C. 158(a)(3)	3, 4
Section 8(a)(5), 29 U.S.C. 158(a)(5)	3
Section 10(e), 29 U.S.C. 160(e)	7

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 569 F.2d 162. The Board's decision and order (Pet. App. 14a-77a) are reported at 227 N.L.R.B. 1061.

JURISDICTION

The judgment of the court of appeals was entered on December 28, 1977. The petition for a writ of

certiorari was filed on March 28, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether employees who strike in support of fellow employees who are striking to protest unfair labor practices by their common employer are entitled to the same reinstatement rights as the primary unfair labor practice strikers.

2. Whether the Board properly found that the union did not contractually waive the employees' statutory right to participate in an unfair labor practice sympathy strike.

STATEMENT

1. Petitioner C. K. Smith Co., Inc., is a retail seller and distributor of oil and related products. Petitioner Buckley Heating Co., Inc., sells and distributes the same products at wholesale. (Pet. App. 30a.) The two companies share the same premises and management, and the National Labor Relations Board found them to be a single employer for the purposes of the Act (Pet. App. 28a-29a). The court of appeals upheld that finding (Pet. App. 3a-4a) and petitioners do not challenge it here.

Petitioners' retail and wholesale drivers were represented, in separate units, by Teamsters Local 170. In March 1974, the union began an organizing campaign among the mechanics at the Smith company (Pet. App. 30a). The Board found that the company violated Section 8(a)(1) of the Act when, during the course of the mechanics' organizing campaign, it engaged in coercive interrogation, promised benefits if the union were defeated, and threatened an employee with loss of work if the union were successful (Pet. App. 42a-43a). The Board further found that the company violated Sections 8(a)(1) and 8(a)(5) of the Act by withdrawing the recognition that it had previously accorded the union in the mechanics' unit (Pet. App. 54a), and by bargaining individually with retail driver unit employees while contract negotiations for that unit were in progress (Pet. App. 37a-38a). Petitioners did not dispute those findings in the court of appeals (Pet. App. 4a).

After the company withdrew recognition from the union, the six mechanic employees voted to strike (Pet. App. 58a). The strike, which began on April 29, 1974, was joined by both the retail and wholesale drivers (Pet. App. 33a, 56a). The Administrative Law Judge, whose decision was adopted by the Board, concluded that the strike was an unfair labor practice strike, caused by the company's various violations of the unfair labor practice provisions of the National Labor Relations Act, 61 Stat. 140, 29 U.S.C. 158(a) (Pet. App. 65a) In addition, the Administrative Law Judge found that the retail and wholesale drivers who joined the strike did so "primarily in sympathy with the strike of the mechanic employees" (*ibid.*). The court of appeals upheld these findings (Pet. App. 5a).

2. On July 8, 1974, the strikers made an unconditional offer to return to work. Petitioners refused to

reinstate the mechanics, the wholesale drivers, and one of the retail drivers, although certain wholesale drivers were reinstated later (Pet. App. 66a-67a). After complaints were filed and a hearing held, the Board found that petitioners had violated Sections 8(a)(1) and 8(a)(3) of the Act by refusing to reinstate both the mechanics and the drivers who had been on strike.

The Board held, first, that the drivers, as employees of the same enterprise, acquired the status of unfair labor practice strikers when they struck in sympathy with the mechanics, who were clearly unfair labor practice strikers (Pet. App. 65a). Second, the Board held that the wholesale drivers had not violated their contractual obligation not to strike because the terms of the drivers' contract did not "reveal a waiver of the right to strike over unfair labor practices or to strike in sympathy with other employees" (Pet. App. 62a-63a).

The court of appeals upheld the Board on both of these issues. The court observed that a sympathy striker resisting unfair labor practices may have more at stake than a similarly situated economic striker. An employer's effort to oust the union from one unit, the court noted, "could have deleterious effects on the union's prestige and the stability of collective bargaining throughout the plant" (Pet. App. 8a). Since sympathy strikers stand in the shoes of primary strikers for purposes of lawful discipline and replacement, the court concluded, "it seems equitable to

afford them preferential reinstatement rights where such rights are granted primary strikers" (*ibid.*).

With respect to the no-strike clause in the drivers' contract, the court held that the Board's interpretation of the clause was supportable in light of the principle that a no-strike provision is ordinarily coterminous with the duty to arbitrate. Since the dispute between the mechanics and the employer could not be the subject of a grievance under the wholesale drivers' contract, there was no duty to arbitrate, and the no-strike clause did not bar the drivers from engaging in a sympathy strike (Pet. App. 11a). Accordingly, the court of appeals upheld the Board's conclusion that petitioners had improperly refused to reinstate the drivers when they made an unconditional offer to return to work.

ARGUMENT

1. It is well settled that employees who strike in response to an employer's unfair labor practices are entitled to full reinstatement upon an unconditional offer to return to work, even if permanent replacements have been hired. *Mastro Plastics Corp.* v. *National Labor Relations Board*, 350 U.S. 270, 278. Similarly, employees who join a picket line established by fellow employees at their common employer's premises are entitled to the same protection as strikers under the Act. *Gary Hobart Water Corp.* v. *National Labor Relations Board*, 511 F.2d 284, 287 (C.A. 7), certiorari denied, 423 U.S. 925; *Kellogg Company* v.

National Labor Relations Board, 457 F.2d 519, 523 (C.A. 6), certiorari denied, 409 U.S. 850; *National Labor Relations Board* v. *Union Carbide Corporation*, 440 F.2d 54, 55-56 (C.A. 4), certiorari denied, 404 U.S. 826; *National Labor Relations Board* v. *Southern Greyhound Lines, Inc.*, 426 F.2d 1299, 1301 (C.A. 5). From these principles it follows that where the primary striker and the sympathy striker have a common employer, the sympathy striker has the same reinstatement rights as the primary striker. *Newspaper Production Co.* v. *National Labor Relations Board*, 503 F.2d 821, 830 (C.A. 5); *General Tire & Rubber Co.* v. *National Labor Relations Board*, 451 F.2d 257 (C.A. 1); *Pilot Freight Carriers, Inc.*, 224 N.L.R.B. 341, 342.

Petitioners argue that these principles should not apply to sympathy strikers who support fellow employees in an unfair labor practice strike against a common employer. The court below rejected that argument, and, contrary to petitioners' contention, there is no conflict among the circuits on this issue.

Petitioners urge that the decision below conflicts with that of the Fourth Circuit in *National Labor Relations Board* v. *Union Carbide Corp.*, 440 F.2d 54. In that case, however, the court held that an employee who declined to cross a picket line out of fear rather than principle was not engaged in concerted activity protected by Section 7 of the Act. In this case, by contrast, the Administrative Law Judge found that the reason the wholesale drivers struck was "pri-

marily in sympathy with the strike of the mechanic employees" (Pet. App. 65a). Petitioners did not except to that finding before the Board, nor did they contend that the finding was inadequate to establish that the wholesale drivers were animated by principle rather than fear. Petitioners are therefore precluded from raising that contention here. 29 U.S.C. 160(e); *Marshall Field & Co.* v. *National Labor Relations Board*, 318 U.S. 253; *National Labor Relations Board* v. *Seven-up Co.*, 344 U.S. 344.

The other court of appeals decisions relied on by petitioners are distinguishable from this case in that in each instance the sympathy strikers worked for a different employer than the primary strikers. *National Labor Relations Board* v. *L. G. Everist, Inc.*, 334 F.2d 312 (C.A. 8); *Teamsters, Chauffeurs & Helpers Local U. No. 79* v. *National Labor Relations Board*, 325 F.2d 1011 (C.A.D.C.), certiorari denied, 377 U.S. 905; *National Labor Relations Board* v. *Brown & Root, Inc.*, 203 F.2d 139 (C.A. 8).[1] Nor does *National Labor Relations Board* v. *International Van Lines*, 409 U.S. 48, reversing 448 F.2d 905 (C.A. 9), in any way support petitioners' position here. In that case, the Court held that since the employer had committed an unfair labor practice when it dis-

[1] Petitioners' reliance on the Board's order in the *Brown & Root* case, 99 N.L.R.B. 1031, 1037, is misplaced. The Board found that those sympathy strikers were represented by a different union, which did not authorize their wildcat strike in support of their fellow employees. And it concluded that they were not affected by the company's unfair labor practice against the other union.

charged certain economic strikers prior to the time they were replaced, the strikers were entitled to re- [redacted] on that ground alone. The Court found it unnecessary to consider whether, as a theoretical matter, the economic strikers were converted into unfair labor practice strikers at the time the employer committed the unfair labor practice of discharging them. 409 U.S. at 52-53. In any event, those strikers were not sympathy strikers. Therefore, contrary to petitioners' assertion (Pet. 16), the question the Court found it unnecessary to resolve has nothing to do with the question presented in this case.

As the court of appeals concluded (Pet. App. 6a), it is the Board's duty to balance the interests of striking employees in the exercise of their Section 7 rights against the employer's legitimate business reasons for replacing them. The Board has concluded that the proper balance between business justification and employee concerted activity requires that sympathy strikers who support an unfair labor practice strike involving a common employer be treated in the same manner as the primary unfair labor practice strikers. That resolution is consistent with the general treatment under the Act of sympathy strikers and of common employer situations, and petitioners have presented no persuasive reasons for applying a different rule in this case.

2. Petitioners further contend (Pet. 25-32) that the Board erred in holding that the no-strike provision of the collective-bargaining agreement did not bar the wholesale drivers from engaging in a sympathy

strike. This issue, turning largely upon the particular facts, does not warrant review by this Court. In any event, the Board's resolution of the matter was correct and was properly upheld by the court of appeals.

The wholesale drivers' contract contained a general no-strike clause. Since the dispute underlying the primary strike could not be processed through the wholesale drivers' grievance machinery, and since that machinery did not permit the company to obtain an arbitral determination of its claim that the wholesale drivers' sympathy strike violated the no-strike clause, the court below properly sustained the Board's finding that the no-strike clause did not bar sympathy strikes.[2] Moreover, even if the no-strike provision were considered to be ambiguous, as petitioner contends (Pet. 25-28), the Board and the court of appeals (Pet. App. 10a-11a n. 2, 63a) found that the bargaining history did not suport petitioners' assertion that the parties intended the no-strike provision to apply to sympathy strikers at the employer's premises.

National Labor Relations Board v. *Rockaway News Supply Co., Inc.*, 345 U.S. 71, on which petitioners rely, does not support their claim. That case involved employees' refusal to cross a picket line at another employer's premises; the Court found persuasive evi-

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[2] In *Buffalo Forge Co.* v. *United Steelworkers of America, AFL-CIO*, 428 U.S. 397, by contrast, the final step of the grievance procedure provided that a grievance "may be submitted to arbitration upon written notice of the Union or the Company" (*id.* at 400 n. 2).

dence that the parties intended the contractual no-strike clause to apply to such situations. Here, by contrast, the Board and the court of appeals found that the parties did not intend to proscribe sympathy strikes against the common employer.

Finally, petitioners contend that the principles of *Mastro Plastics Corp.* v. *National Labor Relations Board*, 350 U.S. 270, requires reversal here. In *Mastro Plastics* the Court held that even if employees ostensibly violated the terms of the collective-bargaining agreement by engaging in an unfair labor practice strike, the agreement would not readily be construed as a waiver of the employees' right to strike over unfair labor practices that undermined the collective-bargaining relationship. *Id.* at 283. Petitioners argue that the unfair labor practices in this case were not sufficiently flagrant to warrant application of the *Mastro Plastics* doctrine.[8]

Since the Board found that the collective-bargaining agreement did not bar the strike in question here, it was not necessary for the Board to rely on *Mastro Plastics* to uphold the strikers' actions. In any event, as the court of appeals held (Pet. App. 10a), *Mastro*

[8] Petitioners also reiterate their contention that there was no causal connection between the unfair labor practices and the drivers' strike, and that therefore the strikers should not have been reinstated. See *Winter Garden Citrus Products Coop.* v. *National Labor Relations Board*, 238 F.2d 128 (C.A. 5). But, as we have noted, the Administrative Law Judge found that the wholesale drivers struck in sympathy with the mechanics, who were engaged in an unfair labor practice strike, and petitioners did not challenge that finding before the Board.

Plastics provides further support for the Board's conclusion that the collective-bargaining agreement should not be read as a contractual waiver of the drivers' right to engage in a sympathy unfair labor practice strike in support of fellow employees.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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